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In The

Supreme Court of the United States

October Term, 1994

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Henry Normandeau,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the absence of ongoing tribal proceedings, do this Court's decisions in *National Farmers Union* and *Iowa Mutual* require a federal court to abstain from deciding whether nonmembers living within the exterior boundaries of an open reservation are subject to tribal civil regulatory jurisdiction over farm and ranch activities conducted by nonmembers on their own fee land?

2. Do this Court's decisions in *Montana*, *Brendale*, and *Bourland* require a federal court, in the absence of ongoing tribal proceedings, to adjudicate the federal question whether nonmembers living within the exterior boundaries of an Indian reservation which Congress opened to settlement by nonmembers are subject to tribal civil regulatory jurisdiction over farm and ranch activities conducted by nonmembers on their own fee land?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Ross Middlemist, Wayne Maughan, and Flathead Joint Board of Control (hereinafter collectively referred to as "the Irrigators"), respectfully request that this Court, pursuant to 28 U.S.C. § 2101(e), issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the Order entered in this matter on April 6, 1994.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the District of Montana has been reported at 824 F. Supp. 940 (1993) and is printed in the Appendix to this Petition at A-1 through A-15. The order of this Court denying the petition for writ of certiorari before judgment of the United States Court of Appeals for the Ninth Circuit is reported at ___ U.S. ___, 113 S.Ct. 2950 (June 7, 1993) and is printed in the Appendix to this Petition at A-16. The order of the panel of the United States Court of Appeals for the Ninth Circuit affirming the decision of the district court has been reported at 19 F.3d 1318 (April 6, 1994) and is printed in the Appendix to this Petition at A-17.

JURISDICTION

The United States District Court entered its Order February 12, 1993. Jurisdiction was conferred by 28 U.S.C. § 1331 and 28 U.S.C. § 1361. The United States Court of Appeals for the Ninth Circuit entered its order on April 6,

1994. The jurisdiction of the Court of Appeals was conferred by 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, Treaty, statutes, ordinance, and regulations, relevant portions of which are set out verbatim in the Appendix:

Constitution of the United States of America, Article IV, § 2, Amendment V, Amendment IX, Amendment X, Amendment XIV, § 1, Amendment XV.

Treaty of Hellgate, July 16, 1855, 12 Stat. 975.

Flathead Allotment Act, Act of April 23, 1904, 33 Stat. 302.

General Allotment Act, Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. §§ 331 *et seq.*

Act of May 29, 1908, 35 Stat. 448.

Act of May 10, 1926, 44 Stat. 453, 464.

Declaratory Judgment Act, 28 U.S.C. § 2201.

Confederated Salish and Kootenai Tribes' Ordinance 87A, Aquatic Lands Conservation Ordinance (ALCO).

ALCO Regulations.

STATEMENT OF THE CASE

The underlying issue raised by the Irrigators in their complaint is whether tribal governments have inherent sovereign authority over nonmember farming and ranching activities conducted on their own fee land within the exterior boundaries of a reservation opened by Congress to nonmember entry and settlement under the Homestead laws of the United States. This petition raises the specific issue whether, in the absence of ongoing tribal proceedings, a federal district court must adjudicate the right of nonmembers to conduct such farming and ranching activity on their own fee land free from tribal government regulation or whether the federal district court is required, instead, to defer to tribal administrative and judicial processes.

The Irrigators here do not contest the legitimacy of tribal sovereignty or tribal authority over those who are members and have consented to tribal government. Nor do they contest tribal sovereignty over land owned by a tribe or held in trust for it. But they strenuously dispute the legitimacy of tribal assertions of authority over nonmember activity on their own fee land on a reservation which was opened to nonmember settlement by specific Acts of Congress. They also strenuously dispute the federal defendants' approval of and support for the tribal assertion of inherent sovereignty over them. This case, then, has broad policy and practical applications for both the proper role of federal courts in vindicating federal rights in such controversies where there are no ongoing tribal proceedings and the proper application of the principles established by this Court in its decisions concerning tribal sovereign power over nonmembers.

1. Petitioners and the Area Immediately Involved.

The salient facts presented by Petitioners, Ross Middlemist, Wayne Maughan, and The Flathead Joint Board of Control (JBC)[1], are simple, arising frequently on reservations Congress opened to nonmember settlement and which now contain populations with a high percentage of nonmembers and significant agricultural areas owned by nonmembers: The individual Petitioners are not members of the resident Confederated Salish and Kootenai Tribes (CSKT) (Complaint, paragraphs 1, 4, 6, A-20,22)[2]; they

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[1] The JBC is a local governmental entity formed under the statutes of Montana to act as a central operating authority for the three irrigation districts which comprise it. (§§ 85-7-1601, et seq., MCA.) The Montana state statutes pertaining to irrigation districts are found at Title 85, Chapter 7, Parts 1-22. Congress specifically authorized the creation and operation of these irrigation districts pursuant to state law. Act of May 10, 1926 (44 Stat. 453, 464). A-55, 57. Included in the 70-odd statutes enacted by Congress specifically addressing the irrigation project which delivers water to these districts is a provision in the authorizing Act of May 29, 1908 (35 Stat. 448) calling for the transfer of the operation and management of the irrigation project to the landowners it serves. These landowners, tribal members and nonmembers, are now represented, with the approval of Congress, A-55,57, by state-chartered irrigation districts, which are local governmental entities under state law.

[2] The Complaint is in the Appendix at A-19 to A-39. When referencing the Complaint, Petitioners provide citations to specific paragraphs in the Complaint as "C-___" and the Appendix as "A-___." Under the standards applicable to motions to dismiss, Rule 12(b)(6), Fed.R.Civ.P., the well-pleaded factual allegations of the Complaint are taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (reversing decision upholding grant of motion to dismiss in civil rights action).

own their land in fee and acquired it pursuant to the allotment laws of the United States (C-11, 20; A-23, 25);[3] their land is situated in an "open" area of the Flathead Indian Reservation which is completely agricultural in nature and has lost any unique character it might have

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[3] In 1859 Congress ratified the Treaty of Hellgate, signed July 16, 1855, 12 Stat. 975, and set aside the Flathead Indian Reservation, located in northwest Montana.

In 1904 Congress enacted the Flathead Allotment Act ("FAA"), directing the Secretary of Interior ("Secretary") to make allotments "under the provisions of the allotment laws of the United States" to tribal members. Act of April 23, 1904, 33 Stat. 302, A-52; see also General Allotment Act ("Dawes Act"), 24 Stat. 388, as amended, 25 U.S.C. §§ 331, *et seq; Montana v. United States*, 450 U.S. 544, 559, n. 9 (1981). In keeping with the General Allotment Act policies, Congress also directed the Secretary to open the remaining lands to nonmember entry and settlement pursuant to the "general provisions of the homestead, mineral, and town-site laws of the United States. . . ." FAA § 8; A-53. In keeping with these same policies, Congress granted "sections sixteen and thirty-six of each township" to the State of Montana for school purposes. FAA § 8; A-53.

In 1908 Congress authorized the creation of the Flathead Irrigation Project to serve both tribal members and nonmembers. Act of May 29, 1908, § 15, amending § 14 of the FAA. A-56. In the 1908 Act, Congress provided for the transfer of the operation and management of the Project to the landowners it serves. A-56.

In 1926 Congress authorized the landowners served by the Flathead Irrigation Project, tribal members and nonmembers, to form irrigation districts "organized under State law. . . ." Act of May 10, 1926, 44 Stat. 453, 464 ("1926 Act"); A-57. In keeping with the allotment era policies then in force, in the 1926 Act Congress specifically provided that all fee patent land, including land formerly under trust patents (allotments) for which fee patents were issued, "shall . . . be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts." *Id.*; A-56.

had when in tribal possession (C-47-70; A-30-33); they cannot be excluded from their land (C-65, 66, 68, 69; A-33); they wish to undertake on their land small projects common in the course of farming and ranching (C-12, 13, 23, 24, 25; A-24, 26); the CSKT tribal government has, nevertheless, asserted it has jurisdiction to regulate their land use and to enforce compliance by unpermitted access to private land for inspections, by issuing compliance and removal orders, by levying fines of up to $500.00 per day, and by removing projects, at the landowner's expense, not voluntarily brought into compliance. (C- 1, 34, 41-46; A-21, 28, 29-30; see also A-40-46.)[4]

Mr. Middlemist, a third-generation rancher on the Flathead Reservation, residing in Sanders County, Montana, must replace a dilapidated stock water tank fed by a small natural spring which arises on his own property and, after running approximately 100 yards, disappears

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[4] Situations of this type arise frequently on reservations which Congress opened to nonmember settlement and which now contain populations with a high percentage of nonmembers and significant agricultural areas owned by nonmembers. *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408, 436, n. 1 (1989). Nationally, of the 780,028 people living on Indian Reservations, at least 47.3 percent are not tribal members. U.S. Department of Commerce, Bureau of Census, News Release July 11, 1991, Table 1. As a result of the General Allotment Act and other Acts of Congress opening the Flathead Reservation, nonmembers now own in fee (according to the tribal government's statistics) 490,120 acres of the 1.2 million acre Reservation; and, of the 113,000 acres within the three irrigation districts which comprise the JBC, approximately 90 percent is owned in fee by nonmembers. Of the Reservation population of 21,259, only 3,000, or 14 percent, are tribal members.

into the ground, still on his property. (C-11, 12; A-23, 24.) He is not a tribal member and has no voice in the CSKT tribal government (C-4; A-22).[5]

This project comes within the asserted jurisdiction of the CSKT tribal government under its Aquatic Lands Conservation Ordinance ("ALCO"), also known as tribal ordinance 87A. (C-1, 34; A-21, 28.) The Agricultural Stabilization and Conservation Service ("ASCS") reaffirmed this when it informed Mr. Middlemist that, while the project qualified for federal funding of $1,050.00, such funding would be withheld until he obtained a tribal permit pursuant to ALCO (C-14, 15, 17; A-24, 25).[6]

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[5] The fundamental right to participate fully in the government process, including participation in the formulation of laws embodying social policy choices by which one must abide, is the primary consideration given by the government in exchange for the consent of the governed. See, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); see also, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

The extraconstitutional nature of tribal power – both its origin and obligations to those it would govern – as the basis of tribal authority over nonmembers requires that it be narrowly limited and clearly defined. The extraconstitutional nature of tribal power is "all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 495 U.S. 676, 694 (1990) (citing the dissent, Stevens, J. in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173 (1982)). See also *Oliphant v. Schlie*, 544 F.2d 1007, 1014-1019 (9th Cir. 1976) (Kennedy, J. dissenting), *rev'd Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[6] This permit requirement is in addition to applying for permits from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks. (C-15; A-24.)

Like Mr. Middlemist, Wayne Maughan, a second-generation farmer on the Reservation, residing in Lake County, Montana, is not a tribal member and has no voice in tribal government affairs. (C-6, 20; A-22, 25.) In cooperation with the JBC and utilizing funds provided by the JBC for a water conservation demonstration project,[7] Mr. Maughan desires to repair a small dam located on his own fee land. (C-23, 24, 25; A-26.)

This project is also within the asserted jurisdiction of the tribal government under ALCO. Like Mr. Middlemist, Mr. Maughan and the JBC were advised by the U. S. Army Corps of Engineers that, in addition to applying for a variety of federal, state and local government permits and approvals,[8] they had to apply to the CSKT for a

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[7] The JBC has participated in this project because it will improve water quality by greatly reducing or eliminating discharges from the small reservoir behind the dam through increased storage capacity and reuse of irrigation return flows, and because by capturing more runoff and irrigation return flows for reuse, the need of Mr. Maughan for deliveries of water to his farm will be decreased, thereby making more water available for upstream irrigators. (C-24, 26, 27; A-26.) Accordingly, the JBC passed a resolution on November 13, 1990, numbered Resolution No. 90-04, and set aside $3,000.00 to help pay for the project. (C-25; A-26.)

[8] Mr. Maughan and the JBC have applied for a "404 permit" from the Army Corps of Engineers pursuant to the Federal Clean Water Act; a Montana Pollutant Discharge Elimination System ("MPDES") permit from the State Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES"); a "124" Stream Preservation Act permit from the Montana State Department of Fish, Wildlife and Parks; a "310" Natural Stream Bed and Land Preservation Act permit from the Lake County Soil Conservation District; a "3A" permit related

permit pursuant to Tribal Ordinance 87A as a condition precedent to undertaking the proposed conservation activities. (C-30; A-28.)

Tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance ("ALCO"), purports to regulate all activity – no matter how minor – planned on wetlands located within the exterior boundaries of the Reservation, whether that land is owned by the United States or the CSKT, tribal members, or, as in the cases of Messrs. Middlemist and Maughan, by non-members who propose to undertake activity on their own fee land. (C-34, 41, 42, 43; A-28, 29.)[9]

The Tribal Department of Natural Resources administers ALCO through the Shoreline Protection Office ("SPO"). (C-38; A-29.) The terms of ALCO require the submission of plans to the SPO for review, approval, modifications, rejection, and issuance of a permit for any project on wetlands prior to doing any work. (ALCO, Part

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to a short-term turbidity variance during construction, from the DHES; and a flood plain development permit from the Department of Natural Resources and Conservation. (C-29; A-27.)

[9] The tribal government has advertised the applicability of ALCO throughout the Reservation as follows:

> Private individuals; corporations, local, county, state, tribal and federal government agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation *must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.*

(Emphasis in original.) (A-47.) This advertisement was attached as Exhibit D to the Irrigators' brief in response to the Tribes' motion to dismiss.

4, §§ 1, 3; A-40, 41.) ALCO imposes fines of up to $500.00 per day for each violation of its provisions, including failure to submit plans, acquire a permit, comply with conditions and modifications dictated by the SPO, or continuance with a disapproved project. (ALCO, Part 6, § 2, ALCO Regulations, §§ 5.1, 5.9; A-41-44.)[10] It also provides for the imposition of remedial measures at the expense of the noncomplying person, as well as removal of a project and restoration of the physical surroundings. (ALCO, Part 6, § 2, R. 5.5, 5.7, 5.8, 5.9; A-41, 42, 44-46.) The ordinance also authorizes warrantless and unpermitted access to any property within the Reservation if a violation is suspected. (ALCO, Part 6, § 1; A-41.)

2. The Complaint and Decisions Below.

The Petitioners challenge the CSKT's assertion of regulatory jurisdiction over their activities on fee land as patently unconstitutional and violative of the limits of tribal jurisdiction established by Acts of Congress and this Court's decisions. *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Bands of Tribes of the Yakima Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993). Despite this conviction, they fear the imposition of heavy fines and penalties if they do not submit to tribal authority. Consequently, they sought declaratory and injunctive relief in the United States District Court for the District of Montana, naming federal and tribal defendants for their part

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[10] Hereinafter ALCO Regulations are cited as "R. ___."

in promulgating, approving, implementing, and supporting the application of ALCO against the Plaintiffs.[11] (Complaint; A-19-39.)

The federal and tribal defendants moved to dismiss on various grounds. In granting these motions the district court erroneously interpreted *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and Ninth Circuit applications of those decisions to allow abstention even in the absence of ongoing proceedings.[12] In dismissing the Irrigators' argument that an exception to the doctrine was present here because the CSKT's assertion of jurisdiction patently violates the Constitution and the limits of tribal jurisdiction defined by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Bands of Tribes of the Yakima Nation*,

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[11] The Plaintiffs named the individual tribal government officials as Defendants based on the principles of *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), and its progeny, which are applicable to tribal government officials acting beyond their legal authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); see also *BNRR v. Blackfeet Tribe, et al.*, 924 F.2d 899, 901-902 (9th Cir. 1991) ("Tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.")

[12] The Conference of Western Attorneys General in *American Indian Law Deskbook*, at 122-131, point out some distinctions in these decisions , including that the Court primarily employed the terminology of "deferral" and "exhaustion" of tribal remedies. While the comment is literally correct, the most important factor in each of these cases is that proceedings were ongoing in tribal courts. The paradigm employed by the Court, and the one urged by the Respondents and amici, particularly in *National Farmers Union*, was *Younger* abstention. See n. 14, *infra*.

492 U.S. 408 (1989) (*South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993) had not yet been decided), the district court below refused to rely on or even examine this Court's decisions defining tribal civil regulatory jurisdiction over nonmembers on fee land or to credit the constitutional arguments raised by the Irrigators.[13]

The Court of Appeals in its order affirmed the decision of the district court below without any further explication of the reasons set forth in the trial court's opinion.

The Irrigators thus are seeking review by this Court of their right to be heard by a federal court and not be

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[13] The district court, in fact, flatly refused to examine whether the assertion of tribal authority here was constitutional on the grounds that the cited exception to the abstention doctrine did not encompass patent violations of the Constitution. (A-12.) This is clearly incorrect as a matter of precedent and logic. In the *Younger* abstention context, from which these exceptions were imported into federal Indian law, this exception includes actions patently violative of the Constitution. *Younger v. Harris*, 401 U.S. 37, 53-54 (1971); quoted in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 366 (1989); see also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37 (1984); *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1361, n. 12 (9th Cir. 1986). As a matter of logic, actions patently violative of the Constitution are perforce violations of jurisdictional limits. If not, the absurd result is that abstention would not apply to a clear violation of a statutory jurisdictional limit or one based on case decisions finding federal preemption, cf., *Norfolk & Western Railway Co. v. PUC of Ohio*, 926 F.2d 567, 572-573 (6th Cir. 1991), but challenges to blatant constitutional violations would be subject to abstention and all the delay in rectifying a clear violation of constitutional rights that entails.

required to exhaust tribal administrative and judicial processes which have not been instituted and whose very jurisdiction over them they dispute.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decisions of the Courts Below Requiring that Federal Courts Defer to Tribal Administrative and Judicial Processes Even in the Absence of Ongoing Tribal Proceedings Conflict with Established Principles of Abstention Enunciated by this Court and Grant Greater Deference to Tribal Proceedings than to State Proceedings.

The lower court decisions to abstain from resolving the federal questions presented in the Irrigators' complaint, even in the absence of ongoing tribal proceedings, conflict with the basis of this Court's decisions in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). The courts below failed to consider the jurisprudential underpinning of the tribal abstention doctrine; namely, *Younger* abstention. In so doing, the lower courts misapplied the precedents of this Court.

The tribal abstention doctrine is clearly premised upon the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). The only abstention decisions cited in *National Farmers Union* were *Younger* abstention cases; and, the same is true for the *Iowa Mutual* decision, except for one reference to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which

allows abstention only in even narrower and more exceptional circumstances than *Younger*. And, both *Younger* and *Colorado River* require that there be ongoing proceedings before the federal court is required to show such deference. Moreover, the exceptions to *Younger* abstention and the tribal abstention doctrine are identical. *National Farmers Union*, 471 U.S. at 856, n. 21, citing *Juidice v. Vail*, 430 U.S. 327, 338 (1977); *Iowa Mutual*, 480 U.S. at 19, n. 12. The reasoning and policies behind *Younger* abstention, therefore, should apply here.[14]

The central and continuing requirement for abstention in the *Younger* context is that there is an ongoing state proceeding in favor of which the federal court should abstain. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989). If there is no ongoing state proceeding and a plaintiff has invoked the federal court's jurisdiction, *Younger* abstention does not apply. "[T]he relevant principles of equity, comity and federalism have little force in the absence of the pending state proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974).

In both *National Farmers Union* and *Iowa Mutual*, the federal district court was faced with a request to interfere with ongoing tribal court proceedings. In *Iowa Mutual*,

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[14] The Respondents in *National Farmers Union*, as well as the Solicitor General and other supporting amici, relied heavily on the existence of ongoing proceedings in that case to support federal court abstention. See, Brief of Respondent Crow Tribe at 14-17; Brief of United States, Questions Presented; Brief of Amici Assiniboine & Sioux Tribes, et al., at 21-23, citing Wright, Law of Federal Courts § 16 (1976) and *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

the Court expressly held that, before abstaining, courts must find "considerations of comity" justifying abstention. *Id.*, at 15-16. Thus, a central element of the Court's decision in those cases to allow district courts to abstain from their "virtually unflagging" duty to exercise their jurisdiction, *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 817 (1976), was whether there was an ongoing tribal proceeding.

To require abstention absent an ongoing proceeding would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case. . . . " *New Orleans Public Service*, 491 U.S. at 368. See, also, *id.*, at 358-359 ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given;" and "the right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." (citations omitted)). Indeed, to require abstention absent an ongoing tribal proceeding "would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989) (citations omitted). Abstention in this context would place a plaintiff "between the Scylla of intentionally flouting [tribal] law and the Charybdis of forgoing what [it] believes to be constitutionally protected activity in order to avoid becoming enmeshed in enforcement proceedings." *Id.* at 1229, quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

In contrast to the classic *Younger* abstention context involving deference by the federal court to ongoing state proceedings, ignoring this basic requirement of ongoing tribal proceedings here would give greater deference to

tribal proceedings than to state proceedings. The primary and most compelling factor of comity driving *Younger* is "Our Federalism." *Younger*, 401 U.S. at 44. This factor, arising from the fundamental constitutional structure, does not apply to tribes. *United States v. Kagama*, 118 U.S. 375, 379 (1886). While significant, congressional policies of tribal self-determination and self-government can not be more compelling than federalism.

Thus, to abstain in the absence of ongoing proceedings would strip from plaintiffs needing to challenge abuses of power by governmental officials the remedy provided by Congress in the Declaratory Judgment Act. 28 U.S.C. 2201, et seq.. Congress enacted this remedy specifically to mesh with the doctrine first enunciated in *Ex Parte Young*, 209 U.S. 123, 159-160 (1908), creating an exception to the doctrine of sovereign immunity and allowing a plaintiff to name a governmental official acting in excess of lawful powers as a defendant. *Steffel v. Thompson*, 415 U.S. 452, 463-467 (1974). The Petitioners have employed this very remedy here.

Without timely intervention by this Court, then, to clarify that the tribal abstention doctrine does not apply in the absence of ongoing tribal proceedings, tribal forums will be given greater deference than that afforded states. Moreover, unless this court intervenes, plaintiffs wishing to invoke their federal statutory right under the Declaratory Judgment Act to challenge tribal governmental abuses of power without actually violating the tribal ordinance will be stripped of this right.

II. This Case Provides an Opportunity for this Court to Apply the Principles of its Prior Decisions in *Montana, Brendale,* and *Bourland* to Define the Proper Role of the Federal Courts in Adjudicating Controversies Where a Tribal Government Attempts to Unlawfully Assert its Authority over Nonmember Activity on Fee Land Which This Trilogy of Cases Holds Is Free From Tribal Regulation.

The tribal abstention doctrine was never meant to cloak from scrutiny assertions of power clearly in excess of limits established by the Constitution, Acts of Congress and this Court. *National Farmers Union*, 471 U.S. at 856, n. 21; *Iowa Mutual*, 480 U.S. at 19, n. 12. The incorporation of tribes into the United States and their loss of the power to exclude nonmembers as the result of Acts of Congress forever altered the "platonic notions" of tribal sovereignty. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 112 S.Ct. 683, 687 (1992). While the form may remain, the substance now consists only of those powers not inconsistent with their dependent status. The Court indicated this left tribes "very narrow powers" over non-Indians. *Id.* at 692. Thus, where plaintiffs can make a prima facie showing that there is neither a textual basis in a treaty or statute nor any other demonstrated basis for a tribal government to assert its jurisdiction over particular nonmember activity, the federal court should exercise its jurisdiction.

In a trilogy of cases, *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Bands of Tribes of the Yakima Nation*, 492 U.S. 408 (1989); and *South Dakota v. Bourland*, ___ U.S. ___ (1993), this Court has established and emphasized that tribes generally lack inherent

authority to regulate nonconsensual activity by nonmembers on their own fee land. However, recent decisions of the Ninth and other Circuits, see, *Stockwest Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (en banc reversal of 942 F.2d 655 (1991)); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, ___ F. 3d ___, 1994 W.L. 244341 (8th Cir. 1994) (petition for rehearing en banc pending), as well as the decisions below in this case, have ignored these holdings of this Court which define the narrow scope of tribal authority over nonmembers; and, instead, these lower courts have mechanically deferred to the tribal processes, both in the absence of ongoing tribal proceedings and in the absence of any demonstrated basis for the assertion of tribal authority over the nonmember activity at issue. In this case, the district court misapplied dicta in *Iowa Mutual* to hold the tribal court "presumptively" has jurisdiction here. A-13. The plurality in *Brendale*, however, rejected this dicta as "misplaced." 492 U.S. at 427, n. 10.

In *Montana*, the Court set out the general rule that tribal governments lack jurisdiction over nonmember activity on fee lands. *Montana*, 450 U.S. at 564-565. It then stated that a tribe *may* "retain inherent sovereign power" to regulate some nonmember activity on fee lands where the nonmember has entered consensual relations (not applicable here) with the tribe or the nonmember activities "so threaten the Tribe's political or economic security, as to justify tribal regulation." *Montana*, 450 U.S. at 565-566.

In *Brendale*, a clear majority of the court (6-3) held as to the nonmember fee land in the "open" area of the

Yakima Reservation that the Yakima Tribe lacked jurisdiction to enforce its zoning ordinance. (The Petitioners' land here is indisputably in the "open" area of the Reservation.)

Relying upon its earlier decisions in *Montana* and *Brendale*, this Court left no doubt in *Bourland* that Tribes do not possess inherent sovereign authority over nonmember activity on fee land, regardless of whether the activity is hunting and fishing or some other land use, and regardless of whether the land is owned by nonmembers or some other non-tribal entity. *South Dakota v. Bourland*, 113 S.Ct. 2309. ("[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress broadly opened up such land to non-Indians the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Id.* at 2318.) The Court emphasized in *Bourland* that when Congress opened reservation lands to nonmembers for entry and acquisition, "[t]hese statutes *clearly* abrogated the Tribe's 'absolute and undisturbed use and occupation' of these tribal lands . . . and thereby deprived the Tribe of the power to license non-Indian use of the lands." *Id.* at 2321. (Emphasis added.)

In "broadly opening up (reservation lands) Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.*, at 2318. Further emphasizing the point, the Court stated, "[T]he reality . . . after *Montana* [is that] tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' 450 U.S., at 564, and is therefore not inherent." *Id.*, at 2320, n. 15. Finally, the

Court clarified that its earlier holdings have broad applicability and may not be distinguished under the guise of examining individual statutes and agreements as they apply to individual tribes or reservations.[15]

Thus, when Congress has by statute opened reservation land to nonmember entry and acquisition, there is no basis, either in a treaty or in a tribe's inherent sovereignty, for the lawful exercise of jurisdiction over nonmember land use. *Bourland* erased any doubts that may have lingered after *Montana* and *Brendale* that a tribe's inherent sovereign authority over nonmember activity on fee land could survive Congress' opening of a reservation and the alienation of land to nonmembers.

In this case, the undisputed facts demonstrate Congress abrogated any authority the CSKT government may have once had over the land in question. Congress opened the Flathead Reservation to settlement under the general homestead, mineral and townsite laws of the United States. Congress granted some of these lands, the school trust lands, to the State of Montana. Congress authorized the creation of an irrigation project and the transfer of the operation and management authority of the Project to the landowners it serves.

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[15] In this respect, *Bourland* adopted on behalf of seven members of the Court the implied rationale of the plurality in *Brendale* when it simply stated that a "tribe's inherent sovereignty is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations,' " and therefore there was no need to examine the effect of specific Treaties or statutes. *Brendale*, 492 U.S. at 425-426 and n. 9.

Later, Congress specifically authorized the formation of irrigation districts under state law to represent these landowners.[16]

As this Court held in *Montana*, in *Brendale* and most recently in *Bourland*, these statutes "clearly abrogated", *Bourland, supra* at 2321, the CSKT government's power to regulate nonmember land use. It cannot claim to possess either inherent sovereign authority or treaty-based authority to regulate nonmember land use. The only possible basis remaining for tribal jurisdiction is the "second *Montana* exception." This mere possibility, however, should not, in the absence of ongoing proceedings, require abstention, particularly since the activity at issue – farming and ranching – is precisely the activity Congress intended nonmembers to undertake on their land free from tribal control. Thus, contrary to a case where a truly exceptional circumstance has arisen, this activity is not exceptional and cannot fall within a tribe's "very narrow" powers. *County of Yakima, supra,* 112 S.Ct. at 692.[17] The basis of tribal authority under this exception, however, has no textual source in either treaty or federal statute.

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[16] See n. 3, *supra.*

[17] Finding that tribal jurisdiction, rather than a federal cause of action, arises out of exceptional circumstances conflicts with the logical foundations of the Court's decisions, particularly in *Brendale* and *Bourland*. Once Congress abrogates tribal sovereignty over an area, the simple fact is that it is gone. To allow tribal sovereignty to be resurrected in exceptional circumstances is extraordinary and should be severely limited. *Brendale,* 492 U.S. at 430 (plurality opinion).

To allow tribal authority over nonmembers where there is no textual basis for the assertion of that authority should require a very strong showing that exceptional circumstances exist. Where there is neither a textual basis for nor any truly exceptional circumstances to legitimize the assertion of tribal jurisdiction, the federal court should exercise its jurisdiction and not defer to tribal processes.

Proceeding from these principles, it is axiomatic that if the tribal government has neither such sovereign power nor treaty-based authority, neither the tribe nor the federal court has any basis to require nonmembers either to exhaust tribal administrative remedies or to plead their case in tribal court before gaining access to a federal forum. Yet, this is precisely what the district court below and the appellate court in its summary affirmance of the district court's opinion without explanation or explication would require. This case, then, provides the Court with an opportunity to apply the principles of *Montana*, *Brendale*, and *Bourland* to define the proper role of the federal courts in exercising their jurisdiction where a tribal government attempts to unlawfully assert its authority over nonmember activity of the type involved here.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated this 5th day of July, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST, WAYNE W. MAUGHAN FLATHEAD JOINT BOARD OF CONTROL,

Plaintiffs,

-v-

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manuel Lujan, Jr., et al.,

Defendants.

CV 91-155-M-CCL

OPINION AND ORDER

(Filed Feb. 12, 1993)

* * *

The Joint Board of Control (JBC) and two individuals have filed this action against the officials of the Department of Interior and individual officials of the Confederated Salish and Kootenai Tribes (Tribes) alleging that the Tribes have no authority to exercise regulatory jurisdiction over activities of non-members on the Flathead Reservation on "fee" lands. Plaintiffs seek declaratory and injunctive relief barring the Tribal government from applying Tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance (ALCO), against the Plaintiffs anywhere and under any circumstances. Plaintiffs are also suing the United States for its role in approving ALCO

and for allegedly providing funding to develop, implement and enforce the Ordinance. Against the Federal Defendants, Plaintiffs seek relief in the nature of mandamus requiring the disapproval of the Ordinance as it applies to nonmember activity.

Tribal Defendants and Federal Defendants have each moved to dismiss the action. Tribal Defendants argue that the court lacks personal jurisdiction over the Tribal governmental officials named in the suit because of the Tribes' sovereign immunity; that Plaintiffs lack standing and capacity to sue; and that Plaintiffs have failed to exhaust Tribal remedies.

The Federal Defendants move to dismiss on the grounds that the Tribes are a necessary and indispensable party to this action and that the actions of the Federal Defendants are protected by sovereign immunity. Federal Defendants also assert that Tribal remedies have not been exhausted.

FACTUAL BACKGROUND

ALCO is a civil regulatory ordinance designed to effectuate the Tribal and federal goals of protecting the quality of Reservation aquatic habitat. The Tribal Council approved ALCO on December 13, 1985. The Secretary of Interior approved ALCO in accordance with the provisions of the Tribal Constitution on December 20, 1985. The Tribes proposed regulations to implement ALCO and published legal notice of the proposed regulations for public comment. The regulations were adopted pursuant to the Tribal Administrative Procedures Ordinance after a comment period. Neither the JBC nor the individual

Plaintiffs sought to challenge the regulations during this notice and comment period.

Plaintiff Ross Middlemist is an irrigator served by the Flathead Irrigation and Power Project (FIPP) and is a constituent and member of the Joint Board of Control. His property lies within the exterior boundaries of the Reservation. Mr. Middlemist intended to engage in a project to improve a natural spring site on his property which he uses to supply a stockwater tank. On September 17, 1991, Middlemist went to the Agricultural Stabilization and Conservation Service (ASCS) in Sanders County and applied for funding for his project which was approved in the amount of $1,050. In October of 1991, Middlemist was informed by the ASCS that in addition to applying for permits for the project from the Army Corps of Engineers and the Montana Department of Fish, Wildlife, and Parks, he would have to apply for a permit from the Tribal Shoreline Protection Office pursuant to the terms of ALCO. Middlemist never applied for such a permit and, therefore, has never paid a filing fee nor been rejected by the Tribal agency. He has not done any construction on his improvement project.

Plaintiff Wayne Maughan also holds fee simple title to property within the exterior boundaries of the Reservation. He is also an irrigator served by FIPP and represented by the JBC. Mr. Maughan has an impoundment reservoir on his property which is fed by Maughan Creek. The dam on Maughan's property requires improvement for safety, water quality reasons, and to expand the capacity of the reservoir.

In their complaint, Plaintiffs allege that the improvement of this dam will improve the quality of the water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows. Additionally, it is believed that the improvement project will result in more water available for upstream irrigators by requiring less to be delivered to Maughan.

To facilitate this project, the JBC passed a resolution on November 13, 1990 and set aside a grant of $3,000 to help pay for the project asserting that the project will benefit the JBC and its constituents. The JBC retained an engineering firm to design and draft plans for the improvement of the dam. Plaintiffs Maughan and the JBC then began the process of applying for state and federal permits and approvals. They did not apply for a permit from the Tribal Shoreline Protection Office, paid no fees, and were not denied a permit by that agency.

Plaintiffs generally assert that the Tribes do not have authority over non-members and that the exercise of Tribal jurisdiction over them is violative of their constitutional rights. Plaintiffs list these rights as the right to vote and hold office in the government under which they live; the right to sit on a jury; the right to be judged by a jury of their peers; and the right to a jury trial in a civil matter.

DISCUSSION: EXHAUSTION OF TRIBAL REMEDIES

Though Defendants have stated various grounds in support of their motions to dismiss, the court finds that the issue of exhaustion of tribal remedies is dispositive of this action in its present posture.

It is well settled that the question of whether an Indian tribe retains the sovereign power to compel a non-Indian property owner to submit to the civil jurisdiction of the tribe gives rise to a federal question. The issue here is whether, in these circumstances, this court must defer exercising jurisdiction until such time as the Tribes' administrative and judicial forums have been exhausted.

In *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), the Ninth Circuit Court of Appeals stated:

> The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction: "[E]xhaustion *is required* before such a claim may be entertained by a federal court." *National Farmers Union*, 471 U.S. at 857, 105 S.Ct. at 2454. In *Iowa Mutual Ins. v. LaPlante*, the Supreme Court said that "federal policy . . . directs a federal court to stay its hand," and "proper respect . . . requires" tribal remedy exhaustion. 480 U.S. at 16, 107 S.Ct. at 976. Therefore, non-Indian petitioners "*must* exhaust available tribal remedies." *Id.* The LaPlante Court emphasized that "*National Farmers Union requires* that the issue of jurisdiction be resolved by the Tribal courts in the first instance." *Id.*

BN v. Crow Tribe, 940 F.2d at 1245 (emphasis in original).

However, before deferring to a tribal forum, "a federal court must examine the circumstances of the individual case in order to determine if deference is necessary, in light of the purposes of the exhaustion requirement." *Stock West Corp. v. Taylor*, 942 F.2d 655. (9th Cir. 1991). These purposes, as set forth in *National Farmers Union*

Insurance Company v. Crow Tribe, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), include the development of tribal self-government, practical considerations of judicial efficiency, and the benefits of tribal expertise and explanations.

Federal Law and Ongoing Proceedings

Plaintiffs initially argue that exhaustion is not applicable in this case because the asserted claims only raise issues of federal law and because there is no ongoing tribal proceeding involved. Exhaustion, however, cannot be avoided for either of these reasons.

Any dispute concerning the extent of tribal sovereignty and authority will involve questions of federal law. The Supreme Court recognized this fact in *National Farmers Union* when it stated that the determination of "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union*, 471 U.S. at 855-856. Even though these sovereignty issues involve federal law, the Court decided that such an examination "should be conducted in the first instance in the Tribal Court itself." *Id.* Therefore, the fact that the jurisdictional question falls under federal law and raises constitutional concerns does not defeat the exhaustion requirement.

Furthermore, the lack of an ongoing proceeding in a tribal forum does not negate the exhaustion requirement.

In *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405 (9th Cir. 1991), it was held that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant." *Id.* at 1407.

The court recognizes that in *Burlington Northern v. Blackfeet Tribe*, 942 F.2d 899 (9th Cir. 1991), the Circuit Court did not require exhaustion because the case presented issues of federal law and no proceeding was pending in tribal court. However, this particular holding has been called an anomaly by the Circuit Court itself in a subsequent case. *Stock West*, 942 F.2d at 633, note 7. Additionally, the clear statement in *Crawford* concerning pending proceedings raises serious questions concerning the validity of *BN v. Blackfeet Tribe* on the exhaustion issue. Therefore, in light of the Circuit Court's clear pronouncement on this issue in *Crawford*, the court finds that the lack of a tribal proceeding does not negate the exhaustion requirement.

Similarly, Plaintiffs rely on the holding of *Stock West* to support their contention that the lack of an ongoing tribal proceeding nullifies the exhaustion requirement. Plaintiffs' reliance on this case, however, is misplaced. The court in *Stock West* held that when an issue in dispute is a "reservation affair" or arises on the reservation, "the federal court has no option but to defer." *Stock West*, 942 F.2d at 661. In reaching its conclusion that the dispute in Stock West was not a "reservation affair," the court pointed to the lack of an ongoing tribal proceeding and the lack of issues related to tribal law. Therefore, the court merely viewed these facts as indicative of a non-reservation affair.

In this case, Plaintiffs have alleged that the subject waters and lands at issue are situated within the exterior boundaries of the Flathead Indian Reservation. Additionally, Plaintiffs are suing Tribal officials and seek to invalidate a Tribal ordinance. Unquestionably, this case is a "reservation affair" which triggers the mandatory exhaustion requirement. *Stock West*, 942 F.2d at 661; *Crawford*, 947 F.2d at 1408.

Policy Imperatives

Even if the dispute here constitutes a "reservation affair," Plaintiffs contend that exhaustion should not be required because none of the purposes for exhaustion set forth in *National Farmers Union* would be advanced in this case. Plaintiffs' contention, however, is not supported by the law or the facts.

In *National Farmers Union*, the Court stated that the first of the three policy imperatives behind exhaustion was based on the Congressional commitment "to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the legal and factual bases for the challenge." *National Farmers Union*, 471 U.S. at 856. Additionally, the court stated:

> Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has

> allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union, 471 U.S. at 856-857.

In *BN v. Crow Tribe*, which is controlling in this case, the Circuit Court addressed the *National Farmers Union* imperatives in the context of a case strikingly similar to the one at bar. In *BN v. Crow Tribe*, the plaintiffs filed suit in federal court seeking a declaratory judgment against tribal officials to invalidate a tribal civil regulatory ordinance as exceeding the Tribes' jurisdiction. In determining that the imperative of tribal self-government would be advanced by exhaustion, the court stated:

> The policy of tribal self-government and self-determination goes to the heart of this case. Through the challenged ordinance, the Tribe reasserts its commitment to sovereign authority over Reservation affairs. The ordinance establishes governmental mechanisms for exercise of that authority. Moreover, the ordinance identifies railroad services as vital to the Tribe's economic development.

BN v. Crow Tribe, 940 F.2d at 1245.

In this case, the Confederated Tribes have asserted their commitment to sovereign authority over Reservation affairs through Ordinance 87A which establishes governmental mechanisms for the protection of aquatic habitat on the Reservation. As in *BN v. Crow Tribe*, the challenged ordinance seems to be important to the well-being of the Tribes and their members for both health and economic reasons.

The policy imperatives concerning judicial efficiency and tribal expertise would also be advanced in this case through exhaustion. As in *BN v. Crow Tribe*, the Tribes are "in the best position to develop the necessary factual record for disposition on the merits. Without that tribal record the federal district court . . . [faces] an action based on an uninterpreted tribal ordinance and an obscure factual background." *BN v. Crow Tribe*, 940 F.2d at 1246. Furthermore, exhaustion will provide the benefits of tribal explanations and expertise to the court in the event of further judicial review. *Id.*

Plaintiffs raise two arguments regarding the purposes of exhaustion which must be addressed. First, Plaintiffs maintain that this case involves only issues of federal law and that no tribal expertise is required. This argument, however, is unavailing for two reasons. First, though Plaintiffs contend that they are susceptible to Tribal regulatory authority, the initial question as to whether the Plaintiffs' proposed projects are within the scope of Ordinance 87A has not been answered. Certainly, the Shoreline Protection Office is best suited to make this determination in the first instance. Second, the fact that issues of federal law are involved does not

diminish the benefits of exhaustion. The growing expertise of tribal courts need not be limited solely to the interpretation of internal laws and regulations. To the contrary, the continuous exposure of tribal courts to jurisdictional questions involving issues of federal law increases the value of their explanations to subsequent reviewing courts. Though exhaustion provides benefits to later reviewing courts, it also benefits tribal courts by encouraging them "to explain to the parties the precise basis for accepting jurisdiction." *National Farmers Union*, 471 U.S. at 857.

The second point raised by Plaintiffs concerning the purposes of exhaustion is based on prior administrative actions taken by the Tribes pursuant to Ordinance 87A. Because the Ordinance has been in effect for several years and has already been interpreted by the Shoreline Protection Board as a grant of authority over all lands within the exterior boundaries of the Reservation regardless of ownership, Plaintiffs suggest that exhaustion is unnecessary, and that this previous interpretation distinguishes this case from *BN v. Crow Tribe*.

In *BN v. Crow Tribe*, the Circuit Court noted that the Crow Tribe had not had an occasion to interpret the ordinance in question before the suit was filed in federal court. In this case, Ordinance 87A has been interpreted previously but only by the Shoreline Protection Board. The scope of Ordinance 87A has not been previously considered by the Tribal Court. Because both administrative and judicial remedies must be exhausted before proceeding in federal court, Plaintiffs' argument concerning prior administrative interpretation is unavailing. *BN v. Crow Tribe*, 940 F.2d at 1247.

Based on the foregoing, the court finds that all three imperatives for exhaustion compel dismissing or staying federal proceedings in this case.

National Farmers Union Exceptions

In *National Farmers Union*, the Supreme Court enumerated three exceptions to the tribal exhaustion doctrine. Exhaustion is not required in situations where the assertion of tribal jurisdiction (1) "is motivated by a desire to harass or is conducted in bad faith," or (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union*, 471 U.S. at 856, note 21. Plaintiffs argue that the latter two exceptions are applicable in this case.

Regarding the second exception, the court notes that Plaintiffs have expanded it to include actions which are patently violative *of the Constitution or* express jurisdictional prohibitions. By improperly adding the constitutional aspect to the exception, Plaintiffs attempt to engage the court in an analysis of their constitutional claims at the exhaustion stage. However, the court will not consider the merits of Plaintiffs' case at this stage of the proceedings.

As to the genuine exception, Plaintiffs cannot point to any action "patently violative of jurisdictional prohibitions." As was discussed above, this dispute is unquestionably a "reservation affair" and arises on the reservation. The Supreme Court has held that "tribal authority over the activities of nonIndians on reservation

lands is an important part of tribal sovereignty. (Citations omitted) Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. Rather than patently violative of jurisdictional prohibitions, Tribal jurisdiction over Plaintiffs in this case "presumptively" lies with the Tribes pending a full examination of tribal sovereignty. Therefore, the second exception to the exhaustion requirement does not apply in this case.

Plaintiffs also contend that exhaustion would be futile because of a lack of an adequate opportunity to challenge the Tribal Court's jurisdiction. Plaintiffs' arguments in this regard include allegations that the Shoreline Protection Board and the Tribal Court have prejudged the issue, that they lack independence from the Tribal Council and the Tribal Legal Department, and that they are biased. However, arguments questioning the competency and neutrality of tribal courts have long been a mainstay in attacks on tribal jurisdiction by nonIndians and have been consistently rejected. *See, e.g. Iowa Mutual*, 480 U.S. 9 (1987); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Therefore, the court finds that the third exception to the exhaustion requirement also does not apply in this case.

Presence of Federal Defendants

Finally, Plaintiffs argue that exhaustion of tribal remedies is impossible in this case because the Tribal Court lacks jurisdiction over the Federal Defendants. Plaintiffs contend they cannot comply with the exhaustion requirement because they cannot file the identical

case in Tribal Court. Plaintiffs, however, have misconstrued the exhaustion requirement.

An order dismissing this action until the exhaustion requirement has been fulfilled is not a remand of the case to Tribal Court. This court cannot compel Plaintiffs to seek relief in Tribal Court but can only act according to the clear directives that have been given it by the United States Supreme Court and the Ninth Circuit Court of Appeals. Pursuant to those directives as enunciated in *National Farmers Union* and its progeny, Plaintiffs can proceed no further with this case in federal court until tribal remedies have been exhausted.

Compliance with the exhaustion requirement, however, does not demand the impossible of Plaintiffs as they suggest. Plaintiffs are not required to file a case in Tribal Court which includes the Federal Defendants. Plaintiffs may seek such relief in Tribal Court as is possible under the law and, once that is accomplished, may seek further relief in this court.

The issues concerning the Federal Defendants in this case are the same basic issues underlying the rest of the action and could be presented in Tribal Court without the Federal Defendants. The exhaustion doctrine requires that a record be developed in tribal proceedings concerning the authority of the Tribal Council to promulgate and enforce Ordinance 87A. That issue is determinative of all of Plaintiffs' claims, including the correctness of the BIA's approval and subsequent funding of the Ordinance. Therefore, the necessary record could be developed in Tribal Court without the presence of the Federal Defendants.

CONCLUSION

Because this case arises on the Reservation, directly implicates Tribal governmental interests, and names Tribal officials as Defendants, it is a "reservation affair." Under such circumstances, tribal remedies must be exhausted prior to the exercise of federal jurisdiction unless the assertion of tribal jurisdiction falls within one of the *National Farmers Union* exceptions. *Crawford v. Genuine Parts*, 947 F.2d at 1408. As none of the exceptions apply in this case, the court must either dismiss the case or stay the proceedings pending exhaustion of tribal remedies. *Id.* at 1407. Therefore,

IT IS HEREBY ORDERED that Defendants' motions to dismiss for failure to exhaust tribal remedies are GRANTED. The case is DISMISSED without prejudice pending exhaustion of tribal remedies.

If Plaintiffs do not inform the court within sixty days of their intent to seek Tribal remedies, the court shall enter final judgment.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 11th day of February, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

Ross MIDDLEMIST, Wayne W. Maughan, and Flathead Joint Board of Control,
petitioners, v. Bruce BABBITT, Secretary of Interior, et al.
No. 92-1757.
June 7, 1993. The petition for a writ of certiorari before judgment is denied.

Ross MIDDLEMIST, Wayne W. Maughan, Flathead Joint Board of Control, Plaintiffs-Appellants,
v.
Secretary of the Interior, Bruce BABBITT; Director of the Bureau of Indian
Affairs, Portland Area, Stanley M. Speaks; Members of the Tribal Council of
the Confederated Salish and Kootenai Tribes, Michael Pablo, Sonny Morigeau,
Louis Adams, Hank Baylor, et al., Defendant-Appellees.
No. 93-35315.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 7, 1994.
Decided April 6, 1994.

ORDER

We affirm the district court on the basis of its well-reasoned published opinion, Middlemist v. Secretary of United States Department of Interior, 824 F.Supp. 940 (D.Mont.1993).

AFFIRMED.

UNITED STATES DISTRICT COURT

MISSOULA DIVISION DISTRICT OF MONTANA

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

V.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manual Lujan, Jr., et al.,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV 91-155-M-CCL

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss for failure to exhaust tribal remedies having been granted, that plaintiff take nothing and the case is dismissed without prejudice pending exhaustion of tribal remedies.

March 11, 1993
Date

LOU ALEKSICH, JR.
Clerk

/s/ Barbara A. Fries
(By) Deputy Clerk

Jon Metropoulos
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
139 North Last Chance Gulch
Post Office Box 1697
Helena, MT 59624
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL

Plaintiffs,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Manuel Lujan Jr.; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louie Adams, Hank Baylor, Tony Incashola,

Cause No. CV-91-155-M-CCL

COMPLAINT

(Filed NOV 6 1991)

John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Snyder, Jim Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Joseph Felsman,

Defendants.

INTRODUCTION

1. In this action, the Plaintiffs seek relief from the imposition of power by the government of the Confederated Salish and Kootenai Tribes in excess of its jurisdiction and in violation of the Plaintiffs' constitutional rights; and from the unconstitutional and illegal support and approval of such violations by officers and employees of the United States. The Plaintiffs are not tribal members. They have no right to vote in tribal elections, hold tribal office, sit on juries in tribal court, or act as a tribal judge. The U.S. Constitution guarantees Plaintiffs these and other rights, including full and equal participation in the government that regulates their activities and in the courts that enforce the laws under which

they live. The individual Plaintiffs own land in fee within the Flathead Reservation, and with the Joint Board of Control they wish to undertake work on that land. Tribal government asserts it has jurisdiction to regulate that work pursuant to tribal Ordinance 87A. The assertion of jurisdiction by the tribal government over these Plaintiffs and the approval and support of this illegal assertion by federal officers and employees violates the Plaintiffs' constitutional rights. Moreover, the assertion of authority by the tribal government over these Plaintiffs exceeds its jurisdiction and is, therefore, illegal and illegitimate.

JURISDICTION

2. This is a civil action for declaratory, injunctive and mandatory relief arising under the Constitution of the United States and the Treaty of Hellgate, entered July 16, 1855 by the United States and representatives of the tribes which now comprise the Confederated Salish and Kootenai Tribes. This Court has jurisdiction pursuant to 28 USC § 1331 and 28 USC § 1361. This court has authority to review the federal administrative actions at issue pursuant to 5 USC § 702. It has authority to grant the requested declaratory, injunctive and mandatory relief pursuant to 28 USC § 2201 and 5 USC § 706.

VENUE

3. Venue is appropriate in the United States District Court of Montana, Missoula Division, pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff Ross Middlemist is a rancher who owns 110 acres in fee in Sanders County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Confederated Salish and Kootenai Tribes (hereinafter "Tribes" or "CSKT.")

5. Plaintiff Middlemist is an irrigator served by the Flathead Irrigation and Power Project (hereinafter "FIPP"), and he is a constituent of the Joint Board of Control. Mr. Middlemist is also a Commissioner for the Jocko Irrigation District and a member of the Joint Board of Control.

6. Plaintiff Wayne W. Maughan is a farmer who owns 280 acres in fee in Lake County, Montana and situated within the exterior boundaries of the Flathead Indian Reservation. He is not a member of the Tribes.

7. Plaintiff Maughan is a constituent of the Joint Board of Control.

8. Plaintiff Flathead Joint Board of Control (hereinafter "JBC" or "Joint Board") is comprised of elected representatives of three Irrigation Districts, the Flathead, Mission, and Jocko Valley, served by the FIPP. The JBC was created pursuant to § 85-7-1601, Mont. Code Ann., et seq. Pursuant to § 85-7-1612, Mont. Code Ann., the JBC has the authority and power, *inter alia*, to institute and maintain any and all actions, including suits at law or in equity, to enforce, maintain, protect, or preserve any and all rights, privileges and immunities enjoyed by the Irrigation Districts and their respective members.

9. The federal Defendants are the Secretary of the United States Department of Interior, the Portland Area Director of the Bureau of Indian Affairs, and the Superintendent of the BIA Flathead Agency. These Defendants, or their predecessors, reviewed and approved tribal Ordinance 87A, or had the responsibility to do so, and continue to lend or facilitate financial and technical assistance for its implementation and enforcement. Hereafter, when mentioned separately from the remaining Defendants, these Defendants are denominated the "federal government Defendants".

10. The remaining Defendants are elected or appointed officials of tribal government or employees of tribal government responsible for adopting, implementing and enforcing tribal Ordinance 87A. Specifically, the elected officials are members of the Tribal Council of the CSKT, which adopted tribal Ordinance 87A. The named tribal government employees or appointees are members of the tribal Shoreline Protection Board, the administrator of the Shoreline Protection Office of the CSKT, and the Director of the tribal Department of Natural Resources, all of whom are charged with implementing and enforcing the Ordinance. Hereafter, when mentioned separately from the federal government Defendants, these Defendants are denominated the "tribal government Defendants".

FACTS

Ross Middlemist

11. Plaintiff Ross Middlemist represents the third generation in his family to farm and ranch on the

Flathead Reservation. He purchased the particular real property where the activities in question are to occur in 1974. The property is homesteaded land in the Dixon Bench area and it is included within the Jocko Irrigation District. It is in Sec. 13 and 14, T. 18 N., R. 22 W.

12. A small natural spring arises from the ground on the property, which Mr. Middlemist holds in fee. This spring runs for approximately 100 yards and disappears into the ground on Mr. Middlemist's property. Mr. Middlemist uses this spring water to supply a stockwater tank. This stockwater tank has become worn over the years and is in need of refurbishing or replacement.

13. Mr. Middlemist planned to improve the site and replace or refurbish the stockwater tank this fall. On September 17, 1991 he went to the Agricultural Stabilization Conservation Service ("ASCS") for Sanders County in Plains, Montana, to ask about financial assistance for this project. After an inspection by a Soil Conservation Service ("SCS") employee, he was told the project would likely qualify for funding.

14. On September 28, 1991 Mr. Middlemist received a letter from the ASCS which stated the project had been approved for funding in the amount of $1,000.00.

15. On October 8 and 9, Mr. Middlemist was informed by the SCS and the ASCS that, in addition to applying for permits for the project from the Army Corp of Engineers and the Montana Department of Fish, Wildlife and Parks, he would have to apply for a permit from the tribal Shoreline Protection Office pursuant to the provisions of tribal Ordinance 87A.

16. Mr. Middlemist stated that while he would apply for all applicable permits, he did not believe tribal Ordinance 87A was legally applicable to him. He was then informed by the ASCS this might impede approval of the project for funding.

17. On October 24, 1991, Mr. Middlemist was informed the ASCS would not provide funding for the project unless he obtained a tribal permit pursuant to Ordinance 87A. He was told the $1,000.00 funding would remain available to him for 30 days, allowing him to decide whether or not to apply for a tribal 87A permit.

18. Mr. Middlemist has not applied for a permit from the tribal Shoreline Protection Office.

19. Mr. Middlemist has done no construction on the project.

Wayne W. Maughan and Joint Board of Control

20. Plaintiff Wayne Maughan holds fee simple title to real property located in the NW 1/4 of Sec. 16, T. 20 N., R. 21 W., which is included within the Mission Irrigation District. He is a second-generation farmer in the area. His family first acquired the property in question by purchase from the State of Montana through a school section sale.

21. Mr. Maughan is an irrigator served by FIPP and represented by the Joint Board of Control.

22. Mr. Maughan has an impoundment reservoir on his property which is fed by a perennial stream, Maughan Creek, and which, along with the creek, drains farmland situated at higher elevations. The stream runs in a generally east-to-west direction.

23. The dam on Mr. Maughan's property requires improvement for safety and water quality reasons and to expand the capacity of the reservoir.

24. Improvement of this dam will improve the quality of water flowing downstream by allowing greater storage and settling of runoff and irrigation return flows; and by allowing reuse of irrigation water. Additionally, by capturing more runoff and irrigation return flows and the reuse of that water, it will make more water available for upstream irrigators by requiring less water to be delivered to Mr. Maughan.

25. To facilitate this project, the Joint Board passed a resolution on November 13, 1990, numbered Resolution No. 90-04, and set aside a grant of $3,000.00 to help pay for the project.

26. This project will benefit the Joint Board and its constituents by improving water quality and the efficiency of water use and by enhancing irrigation capabilities and opportunities.

27. This project is part of a demonstration program for projects providing both water quality and irrigation benefits. Similar projects are anticipated on the lands of Joint Board constituents, including non-member-owned fee lands, to enhance irrigation opportunities, promote the efficient use of water, and improve water quality.

28. The Joint Board retained an engineering firm to inspect the dam and design and draft plans for its improvement. In the course of that work, the engineer

inspected the dam and consulted on the plans for improving the dam with the Montana State Department of Natural Resources and Conservation ("DNRC"), Dam Safety Section. The DNRC determined the dam is not a high-hazard dam and therefore the Joint Board and Mr. Maughan need not obtain either a construction or operating permit from DNRC.

29. Mr. Maughan and the Joint Board then began the process of applying for the requisite state, federal and local government permits and approvals. Specifically, the Joint Board and Mr. Maughan have begun the process of applying for or intend to apply for, when appropriate, the following permits:

(i) a "404 permit" from the Army Corps of Engineers;

(ii) a Montana Pollutant Discharge Elimination System ("MPDES") permit from the state Water Quality Bureau of the Department of Health and Environmental Sciences ("DHES");

(iii) a "124" Stream Preservation Act permit from Montana State Department of Fish, Wildlife & Parks;

(iv) a "310", Natural Streambed and Land Preservation Act permit from the Lake County Soil Conservation District;

(v) a "3A" permit related to a short-term turbidity variance during construction, from the DHES;

(vi) a flood plain development permit from the DNRC.

30. The Army Corp of Engineers informed the Joint Board of Control the tribal Shoreline Protection Office, pursuant to tribal Ordinance 87A, would have to review the project.

31. Neither the Joint Board nor Mr. Maughan have applied for a permit from the tribal Shoreline Protection Office.

32. Neither the Joint Board nor Mr. Maughan have done any construction on the project.

Tribal Ordinance 87A

33. The Aquatic Lands Conservation Ordinance ("ALCO"), designated tribal Ordinance No. 87A, was adopted by the Tribal Council on December 13, 1985. By its terms, it became effective upon the promulgation of implementing regulations by the Tribal Council on December 5, 1986.

34. By its terms, Ordinance 87A purportedly applies throughout the Flathead Indian Reservation regardless of whether the person who intends to engage in a project within the definition of ALCO is a tribal member or not, or whether or not the project is to be carried out on land owned in fee by a nonmember.

35. The federal government defendants or their agents or employees, or some of them, provided technical and financial assistance to the tribal government defendants for the development of Ordinance 87A.

36. The federal government defendants or their agents or employees, or some of them, provide technical

and financial assistance to tribal government for the implementation and enforcement of Ordinance 87A.

37. The Secretary of the Interior, or a subordinate to whom he delegated the authority, approved Ordinance 87A.

38. The Shoreline Protection Office ("SPO"), which administers and enforces Ordinance 87A, is part of tribal government. It is an office within the tribal government's Department of Natural Resources.

39. J. Lloyd Jackson is the administrator of the SPO.

40. Rhonda R. Swaney is the Director of the Department of Natural Resources.

41. The SPO has advertised by radio and newspaper that Ordinance 87A is applicable throughout the reservation and anyone planning to do any work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation must adhere to its provisions.

42. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO prior to doing any work on the project.

43. Ordinance 87A requires any person who intends to undertake work on or near natural streams, perennial and intermittent, rivers, lakes, or wetlands within the Reservation to present a written application to the SPO for a determination of whether or not the planned project falls within the scope of its provisions.

44. Ordinance 87A requires each applicant to pay a nonrefundable fee.

45. Tribal government, through the SPO and the Shoreline Protection Board, enforces Ordinance 87A and would enforce its provisions against the Plaintiffs if they proceed with their projects without following the requirements of Ordinance 87A.

46. Ordinance 87A provides that any person engaging in a project without a valid 87A permit shall be subject to proceedings in tribal court for abatement and a penalty of up to $500.00 for each day the project is deemed in violation. The tribal court, pursuant to 87A, may also order a violator "to restore at his own expense the damaged lands and waters. . . ."

The Flathead Reservation

47. The Treaty of Hellgate signed July 16, 1855 by representatives of the United States and the Flathead Nation, the Upper Pend d'Oreilles, and the Kootenais provided for the reservation to these Indian Tribes of the land now within the exterior boundaries of the Flathead Indian Reservation.

48. The Reservation encompasses approximately 1.2 million acres of land in northwest Montana. Approximately 50% of the Reservation area is owned by individuals in fee. Of this amount, the majority is owned by individuals who are not members of the CSKT.

49. Of the remaining Reservation acreage, the federal government owns approximately 22,000 acres; and the State of Montana owns approximately 30,000 acres.

50. The remainder of the Reservation is either held in trust by the United States for the Tribes or individual tribal members or owned by the Tribes.

51. The majority of tribal and trust lands is situated along the periphery of the Reservation and along the Flathead River corridor. The valleys of the Reservation are largely owned in fee by nonmembers of the Tribes.

52. Article two of the Treaty of Hellgate provided that the Reservation was to be "for the use and occupation" of the Tribes "and as a general Indian reservation . . . " Article two also provided the reservation was to be "for the exclusive use and benefit" of the Tribes, and that no "white man, excepting those in the employment of the Indian Department (shall) be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent."

53. Article six provided that the President may in his discretion cause the whole or a portion of the reservation to be surveyed and allotted to individuals or families of the Tribes, citing as providing the terms and regulations for the location of individuals or families on allotments the sixth article of the treaty with the Omahas.

54. In Article eight of the Treaty, the Tribes acknowledged "their dependence upon the Government of the United States. . . . "

55. Congress enacted the General Allotment Act, 24 Stat. 388, as amended, 25 USC §§ 331 et seq., in 1887, the policy of which was to effect the gradual assimilation of

the Indian population and the gradual extinction of Indian reservations and Indian titles.

56. Toward this end, Congress provided in the General Allotment Act for the allotment of reservation lands to tribal members, the eventual removal of restrictions on alienation of such allotments, and the opening of unallotted reservation lands to non-members for settlement.

57. Pursuant to this policy, Congress, by the Act of April 23, 1904 (33 Stat. 302), provided for the survey and allotment of the Flathead Reservation to persons having tribal rights and the subsequent disposal of unallotted lands to nonmembers pursuant to the requirements of the Act.

58. Pursuant to these Acts of Congress and Presidential Proclamations issued under their provisions and through alienation of lands allotted to tribal members, nonmembers of the Tribes have come to own the majority of fee land on the Reservation.

59. The Reservation forms a portion of three counties, those being Missoula County, Sanders County, and Lake County.

60. The entire Reservation population according to the latest U.S. census figures is 21,259. Of this amount, 3,000, or 14% are tribal members. Thus, 86% of the Reservation population is comprised of nonmembers of the Tribes.

61. Nonmembers are excluded from entering certain areas of the Reservation by tribal government.

62. Federal, state, and local governmental agencies exercise regulatory jurisdiction over various activities

and occurrences on the Reservation, including the activities in question here which the Plaintiffs wish to undertake.

63. Tribal government exercises the inherent sovereign power of the Tribes and it is not a local government deriving its authority from the sovereignty of the state or federal governments.

64. Non-members are excluded from receiving or utilizing certain services provided by tribal government.

65. In its governmental capacity, the federal government cannot exclude any nonmember from entering the Reservation.

66. In its governmental capacity, the federal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

67. In its governmental capacity, the federal government can neither prohibit nor condition the activities of the Joint Board.

68. In its governmental capacity, the tribal government cannot exclude any nonmember from entering the Reservation.

69. In its governmental capacity, the tribal government cannot exclude Plaintiffs Middlemist and Maughan from access to their property, nor can they condition such access.

70. In its governmental capacity, the tribal government can neither prohibit nor condition the activities of the Joint Board.

71. Nonmembers may not serve on juries in tribal court, hold elective office within tribal government, serve as a tribal judge, or vote in tribal government elections.

72. The U.S. Constitution guarantees citizens the fundamental right to vote for and have an equal voice in the election of the government under which they live. The U.S. Constitution guarantees citizens the fundamental right to run for and hold elective office in the government under which they live. The U.S. Constitution guarantees citizens the right to a jury trial by their peers in civil cases where the common law provides such right. The U.S. Constitution guarantees citizens an equal right to serve as jurors in civil cases. The U.S. Constitution requires the United States to guarantee to each state a republican form of government, the benefits of which inure to the citizens of the states. The U.S. Constitution guarantees the Plaintiffs these and other rights notwithstanding their residence within the exterior boundaries of the Flathead Reservation.

Count One

73. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

74. The assertion of authority by the tribal government Defendants pursuant to tribal Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inconsistent with the Tribes' status as a dependent sovereign incorporated within the United States and subject, in its external relations, to the Constitution.

75. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Two

76. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

77. The assertion of authority by the tribal government Defendants pursuant to Ordinance 87A over the activity of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of tribal sovereignty and therefore tribal government jurisdiction as it is inimical to the overriding federal interest and obligation to provide, guarantee and ensure a republican form of government.

78. The exercise of tribal government power pursuant to Ordinance 87A injures the Plaintiffs by depriving them of their right to live under a republican form of government as guaranteed by the Constitution.

Count Three

79. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

80. The assertion of authority by the tribal government defendants pursuant to Ordinance 87A over the activities of the Plaintiffs on lands owned in fee by nonmembers exceeds the scope of their sovereignty and therefore their jurisdiction as it is inimical to the overriding federal interest and obligation to provide and safeguard civil liberties and rights guaranteed by the Constitution of the United States.

81. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Four

82. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

83. The Reservation areas in which the Plaintiffs have planned projects on aquatic lands are self-contained, definable areas in which non-tribal fee lands predominate. Tribal government has no significant interest in controlling these activities, and the Tribes therefore lack jurisdiction to apply and enforce Ordinance 87A.

84. The exercise of tribal government power in this matter pursuant to Ordinance 87A injures the Plaintiffs

by violating their rights under the Constitution, as it requires Plaintiffs to seek permits for activities to be conducted on nonmember fee-owned land from a government in which they do not have a right to full and equal participation. It further injures the Plaintiffs by requiring them to pay a nonrefundable fee to a government without jurisdiction over them; and in the case of Mr. Middlemist it has caused the loss of funding for his project.

Count Five

85. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

86. The Secretary of Interior and his agents have the duty to refrain from acts violating the Constitution and the rights it secures to all citizens. The Secretary of Interior and his agents have the duty, when it is within their legal powers, to prohibit, prevent, and rectify violations by the tribal government of the Constitution and the rights secured to all citizens.

87. The Secretary of Interior and his agents, having approved and reviewed and failed to disapprove or modify tribal Ordinance 87A, aided, abetted, encouraged and failed to prohibit or restrain the violation by the tribal government of constitutional rights of the Plaintiffs. By approving Ordinance 87A, the Secretary of the Interior and his agents acted illegally, unconstitutionally and, therefore, beyond the scope of their powers, since their actions approved an ordinance violative of the Plaintiffs' constitutional rights.

Count Six

88. The Plaintiffs hereby incorporate all allegations in the preceding paragraphs of this Complaint.

89. The federal government, through the Department of Interior, Bureau of Indian Affairs, provides funding and technical assistance used in the implementation and enforcement of Ordinance 87A. The federal government, through the Department of Interior, Bureau of Indian Affairs, provided funding and technical assistance used in the development of Ordinance 87A.

90. By providing funding and technical assistance for the development, implementation and enforcement of Ordinance 87A, the Secretary of Interior and his agents acted and continue to act unconstitutionally and illegally and, therefore, beyond the scope of their powers, since their actions supported and continue to support an Ordinance violative of the Plaintiffs' constitutional rights.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request this court to grant the following relief:

1. A declaratory judgment that tribal government lacks the jurisdiction to apply and enforce the provisions of tribal Ordinance 87A against the Plaintiffs.

2. A permanent injunction enjoining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs.

3. Upon motion of the Plaintiffs and after hearing set by the court, a preliminary injunction, restraining the tribal government defendants from applying or attempting to apply or enforce tribal Ordinance 87A against the Plaintiffs until this matter can be fully litigated.

4. Relief in the nature of mandamus requiring the federal government defendants to disapprove tribal Ordinance 87A insofar as it purports to apply to nonmember activity on nonmember-owned land.

5. Relief in the nature of mandamus requiring the federal government defendants to withdraw technical and financial assistance for the implementation of tribal Ordinance 87A insofar as that technical and financial assistance supports, aids and encourages the imposition of tribal government power beyond its jurisdiction and in violation of the Plaintiffs' Constitutional rights.

6. Such other relief as the court deems just and proper.

DATED this 6th day of November, 1991.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: Jon Metropoulos
Jon Metropoulos
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(406) 449-6220
Attorneys for Plaintiffs

Ordinance No. 87-A

AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

PART I

SHORT TITLE, AUTHORITY

Section 1. Short Title

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

* * *

PART IV

PERMITS

Section 1. Permit Required

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

* * *

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

* * *

PART VI

ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized agenyt (as handwritten in original)] may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars

for each day that the responsible person continues to engage in or maintains a nonconforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

* * *

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985, with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (l), (n), (t) and (u) of the Tribes Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James H. Steele
Vice-Chairman,
Tribal Council

ATTEST:

/s/ Illegible
Executive Secretary

APPROVAL:

_____
Title_____
Bureau of Indian Affairs
Date:_____

APPROVED:
/s/ Donovan R. Boldt
SUPERINTENDENT
Received Office of
Superintendent
Dated DEC 16 1985

FINAL REGULATIONS FOR THE AQUATIC LANDS CONSERVATION ORDINANCE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

(December 5, 1986)

* * *

Section 1.1 Authority.

These regulations are adopted under authority of Ordinance 87A of the Confederated Salish and Kootenai Tribes, the Aquatic Lands Conservation Ordinance.

* * *

PART V

ENFORCEMENT

Section 5.1 Violations.

The following actions shall constitute an act of non-compliance with these regulations and Ordinance 87A:

(1) commencement or initiation of a project without the responsible person first obtaining a permit; or

(2) continuation of work on an unpermitted project by any person; or

(3) failure to comply with the terms or conditions of a permit; or

(4) failure to comply with the terms and conditions of Ordinance 87A and these regulations; or

(5) failure to comply with orders of the Board.

* * *

Section 5.5 Penalties.

Upon a finding that the person served with a Notice of Non-Compliance has committed a violation of Ordinance 87A, these regulations, a condition of a permit, or an order of the Board, any or all of the following penalties may be assessed and ordered:

(1) revocation of an applicable permit;

(2) removal of the project and restoration of the underlying property;

(3) imposition of a monetary fine;

(4) prescription of remedial measures.

Section 5.6 Actions to Enforce.

The Administrator may institute in Tribal Court, under the procedures there applicable, a civil action to collect against any person who has been ordered to pay a penalty or perform remedial measures pursuant to these regulations and who has not appealed such decision or who has not paid an assessed fee, costs, or penalty.

Section 5.7 Revocation of Permit and Restoration of Permit Area.

(a) In addition to revocation of a permit the responsible person may be ordered to remove a project and to restore the area surrounding and underlying the project.

(b) Removal of a project and restoration of the surrounding area must be accomplished within sixty (60) days of of [sic] an order directing such action, except that the Board or Court may, on its own initiative, or upon

application of the responsible person, delay the removal and restoration for up to twelve months if it is determined that such delay would reduce the likelihood of environmental damage resulting from such removal and restoration.

Section 5.8 Failure to Comply With an Order to Remove.

(a) In the event that a person responsible for a project fails to comply with an order directing removal and restoration, the Board, after the lapse of a sixty-day grace period, may undertake the removal of the project and restoration of the underlying property on its own initiative, and may assess the responsible person for the costs of such work.

(b) The Administrator must notify the responsible person by mail at least five (5) days in advance of the planned enforcement action that it plans to remove the project and perform any necessary restoration.

Section 5.9 Fines.

(a) Any person responsible for a project constructed or maintained contrary to the provisions of Ordinance 87A, these regulations, or the terms of a permit shall be subject to a penalty of not less than twenty-five dollars ($25) or more than five hundred dollars ($500) for each act of non-compliance.

(b) Each day during which an act of non-compliance shall continue shall be considered a separate violation of these regulations and of Ordinance 87A.

(c) Nothing in these regulations will be interpreted to deny the use of other civil remedies available under Tribal or federal law.

* * *

The Confederated Salish and Kootenai Tribes
of the Flathead Reservation

SHORELINE PROTECTION OFFICE

Box 278
Pablo, Montana 59855
(406)675-2700
Ext. 368

Conf S+K Tribes
5/4-12/31/89
#210

NOTICE

Private individuals; Corporations, Local, County, State, Tribal and Federal Government Agencies who are going to be doing any type of construction work on or near any natural streams, rivers, lakes, or wetlands within the Flathead Reservation **must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.**

This regulation is in accordance with Tribal Ordinances 87A, the Aquatic Lands Conservation Ordinance and 64A (revised), the Shoreline Protection Ordinance.

These ordinances represent the effort of the Confederated Salish & Kootenai Tribes to maintain the vital link between land and water for present and future generations. The economic well-being and quality of life for everyone living on the Flathead Reservation is largely dependent upon the reservations' wealth of natural resources and how they are managed.

Applications may be acquired by calling (406) 675-2700, extension 368, or by picking one up at the Shoreline Protection Office in the Tribal Complex at Pablo.

Reservation Waters Need Your
PLEASE Keep Them Clean

PLAINTIFF'S EXHIBIT D

UNITED STATES CONSTITUTION

ARTICLE IV

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

TREATY WITH THE FLATHEADS, ETC., 1855.

July 16, 1855. *Articles of agreement and convention made and concluded at the treaty-ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them.*

* * *

ARTICLE 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

* * *

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to

reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent.

* * *

(12 Stat. 975)

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

* * *

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said

lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President.

* * *

Approved April 23, 1904 (33 Stat.L., p. 302)

28 USCS § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

---

28 USCS § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, ch 646, § 1, 62 Stat. 964.)

AN ACT To authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled –

* * * * * * *

SEC. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be, and the same is hereby, amended to read as follows: * * *

Provided, however, That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act shall, in addition to the payment required by section nine of said act, be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

"The entryman of lands to be irrigated by said system shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. * * *

"When the payments required by this act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for such construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. * * *

That section fourteen of said act be, and the same is hereby, amended to read as follows:

"SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; * * *

* * * * * * *

Approved, May 29, 1908. (35 Stat.L., p. 448.)

[May 10, 1926, 44 Stat. 453, 464]

CHAP. 277. – An Act Making appropriations for the Department of the Interior for the fiscal year ending June 30, 1927, and for other purposes.

* * * *

For continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana, by and under the direction of the Commissioner of Indian Affairs, including the purchase of any necessary rights or property, $575,000: *Provided*, That of the total amount herein appropriated not to exceed $15,000 shall be available for operation and maintenance of the project, the balance to be available for the construction items hereinafter enumerated in not to exceed the following amounts: Pablo Feed Canal enlargement, $100,000; Moiese Canal enlargement, $15,000; South Side Jocko Canal, $40,000; Hubbart Feed Canal, $7,500; Camas A. Canal, $2,500; Continuing construction of power plant, $395,000, of which sum $15,000 shall be immediately available for additional surveys and preparation of plans: *Provided further*, That no part of this appropriation, except the $15,000 herein made immediately available shall be expended on construction work until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction

cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power development; second, to liquidate payment of the deferred obligation on the Camas Division; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project; and fourth, to liquidate operation and maintenance costs within the entire project. Provision shall also be contained therein requiring payment of operation and maintenance charges annually in advance of each irrigation season and prohibit the granting of a water right to or the use of water by any individual for more than one hundred and sixty acres of land irrigable under constructed works within the project after the Secretary of the Interior shall have issued public notice in accordance with the Act of May 18, 1916 (Thirty-ninth Statutes at Large, pages 123-130); all lands, except lands owned by individual Indians, at the date of public notice in excess of one hundred and sixty acres not disposed of by bona fide sale within two years after said public notice shall be conveyed in fee to the United States free of encumbrance to again become a part of the public domain under contract between the United States and the individual owners at the appraised price fixed at the instance of the Secretary of the Interior, such amount to be credited in reduction of the construction charge against the land

within the project retained by such owner. All lands so conveyed to the United States shall be subject to disposition by the Secretary of the Interior in farm units at the appraised price, to which shall be added such amount as may be necessary to cover any accruals against the land and other costs arising from conditions and requirements prescribed by said Secretary: *Provided further,* That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts: * * *

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No. 94-42

In The

Supreme Court of the United States

October Term, 1994

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA, FLATHEAD AGENCY, Ernest Moran, in their capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, and Henry Normandeau,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR TRIBAL RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Petitioner's refusal to exhaust available Tribal remedies, as required under *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), coupled with the resultant lack of any judicial record on the merits of the underlying challenge to Tribal jurisdiction, render certiorari unwarranted?

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No. 94-42

In The

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October Term, 1994

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA, FLATHEAD AGENCY, Ernest Moran, in their capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, and Henry Normandeau,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR TRIBAL RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the District Court, reported at 824 F.Supp. 940 (D.Mont. 1993), is reprinted in Petitioner's Appendix to its Petition for Certiorari at A-1 through A-15. This Court has previously denied certiorari under Supreme Court Rule 11, at ___ U.S. ___, 113 S.Ct. 2950 (1993), found at page A-16 of Petitioner's Appendix. The final decision of the Ninth Circuit Court of Appeals summarily affirming the dismissal for failure by Petitioners to exhaust Tribal remedies is reported at 19 F.3d 1318 (9th Cir. 1994), page A-17 of Petitioner's Appendix (hereafter "Pet. App.").

JURISDICTION

Jurisdiction over this final decision of the Circuit Court lies at 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

Petitioners incorrectly identify the jurisdiction of this Court at 28 U.S.C. § 2101(e) (Petition p. 2), which applies to "review a case before judgment has been rendered in the court of appeals."

Tribal Respondents were served with the Petition on July 7, 1994.

CONSTITUTION, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case exclusively involves the following Tribal ordinances and regulations, reprinted in the Tribes' Appendix:

1) The Aquatic Lands Conservation Ordinance, Ordinance 87A (verbatim)

2) The Aquatic Lands Conservation Ordinance Regulations (relevant portions)

STATEMENT OF THE CASE

This case highlights Petitioner's repeated efforts to avoid the requirement of exhaustion of Tribal remedies established in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) (hereafter *"National Farmers"*), and ratified in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) (hereafter *"Iowa Mutual"*). There, this Court ruled that any person challenging an assertion of Tribal jurisdiction over "reservation affairs" must first exhaust Tribal remedies prior to attempting federal court review. *Iowa Mutual* at 16. In this case, all lands, all acts of Tribal government, all Tribal Respondents and all Petitioners occur, are located or reside on the Flathead Indian Reservation. Accordingly, as the trial court determined, this is a "reservation affair." *Middlemist v. Secretary of the United States Department of Interior, et al.*, 824 F.Supp. 940, 944 (D.Mont. 1993), *cert. denied* ___ U.S. ___, 113 S.Ct. 2950 (1993), *aff'd* 19 F.3d 1318 (9th Cir. 1994) (hereafter *"Middlemist"*), (Pet. App. A-7).

In a well-reasoned decision adhering strictly to the Tribal exhaustion rule, the district court properly dismissed this case because Petitioners failed to exhaust Tribal administrative and judicial remedies provided for in the Aquatic Lands Conservation Ordinance ("ALCO"), a "civil regulatory ordinance designed to effectuate the

Tribal and federal goals of protecting the quality of Reservation aquatic habitat" *Middlemist* at 942 (Pet. App. A-2).[1]

In an extraordinary move, Petitioner sought immediate Supreme Court review of the district court decision, which was denied. ___ U.S. ___, 113 S.Ct. 2950 (1993). They then appealed to the Ninth Circuit, raising arguments identical to those in this Petition. The Circuit Court unanimously upheld the District Court dismissal in a one-sentence decision. In their unending efforts to avoid working with the Tribes, Petitioners request this Court to ignore *National Farmers* and *Iowa Mutual* and to conduct a trial de novo on unverified "facts" and selectively edited bits and pieces of a treaty, various Acts of Congress, and state laws which, having never been addressed by the Court below, are improperly included in the Petition and Appendix.

ALCO, the challenged ordinance, was approved by the Secretary of Interior in accordance with the Tribes' Indian Reorganization Act-based Constitution (25 U.S.C. § 461 et seq.). Implementing regulations were promulgated in 1986 after completion of a public review, comment and hearing process required under the federally-approved Tribal Administrative Procedures Ordinance. Even at this stage Petitioners did not avail themselves of

---

[1] The Shoreline Protection Board, comprised of Tribal members and non-Indians, is the Tribal agency charged with administering ALCO. *See* Tribes' Appendix at A-5. Administrative remedies contained in ALCO and the regulations are set out in Tribes' Appendix A-10 and A-13 through A-18 respectively. Of note, Petitioners omitted these critical provisions of Tribal law from their Appendix.

the opportunities to participate in the actions of Tribal government. *See Middlemist* at 942 (Pet. App. A-2 through A-3). Petitioners never made application for a permit, never paid a fee, and were not denied a permit under ALCO. *Middlemist* at 943 (Pet. App. A-4).

Petitioners filed their challenge to Tribal jurisdiction in the federal court in the first instance, completely ignoring the available Tribal forums. The Tribes moved to dismiss based on Petitioner's failure to exhaust Tribal administrative and judicial remedies, as well as on questions of ripeness, standing, capacity to sue and sovereign immunity. *Middlemist* at 942. (Pet. App. A-2). Petitioners also sued the United States, which similarly moved to dismiss for, *inter alia*, failure to exhaust Tribal remedies. *Middlemist* at 942. (Pet. App. A-2).

Dismissal was granted solely on the basis of Petitioner's failure to exhaust Tribal remedies. *Id.* at 947. (Pet. App. A-4). Since the case never went to trial, there is no federal judicial record on the merits of Petitioner's challenge to Tribal civil jurisdiction over this reservation affair. Because Petitioners chose to ignore the Tribal forums, no Tribal record exists either.[2]

---

[2] Supreme Court Rules 14(k)(i) and 14(k)(ii) require Petitioners to submit findings of fact and conclusions of law from the lower court. Instead, Petitioners unload a collection of 'facts' and law wholly outside of any record. For example, even though no court has determined that any lands are "open" or "closed" within the intensely fact-bound context of *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), they assert that several select tracts are "indisputably in the 'open' area of the Reservation." Petition at 20. That is both highly speculative and subject to dispute.

To the extent that any judicial record exists, it lies in the *Middlemist* opinion which addresses only Petitioner's failure to exhaust Tribal remedies contained in ALCO and its regulations. The decision is absolutely silent on the Constitutional, treaty and statutory construction and interpretation issues that Petitioners attempt to submit to this Court for de novo review.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND RELEVANT DECISIONS OF THIS COURT.

The Court below addressed the single question of whether a complaint filed in federal District Court challenging an assertion of Tribal civil jurisdiction over non-Indians within the exterior boundaries of an Indian reservation was properly dismissed for failure to first raise and exhaust that challenge in the Tribal forums whose jurisdiction is being challenged.

That important federal question has been answered in the affirmative by this Court in *National Farmers* and

---

Similarly, despite assertions that ALCO is "patently unconstitutional and violative of the limits of tribal jurisdiction established in the Acts of Congress and this Court's decisons" (Petition p. 11), there is no administrative or judicial record to support that claim.

Petitioner's Appendix contains equally improper inclusions of (highly selectively edited) material in the form of bits and pieces of the Hellgate Treaty and various Acts of Congress not of record nor relied upon by the lower court.

Iowa Mutual, which control this case. The Court in *National Farmers* found that

> the existence and extent of a tribal court's jurisdiction will require a *careful examination* of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a *detailed study* of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself.

Id. at 855-856 (footnote omitted, emphasis added).

This Court concluded that "exhaustion is required before such a claim may be entertained by a federal court" because

> Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief.

Id. at 857 (citation omitted).

The District Court identified the three narrow exceptions to the exhaustion requirement found in *National Farmers* at 856, note 21, and properly determined that Petitioners failed to qualify for any of them. *Middlemist* at 946 (Pet. App. A-12). Having failed, Petitioners seek to fabricate new exceptions. First, they argue that since they filed under the Declaratory Judgment Act (28 U.S.C.

§ 2201), exhaustion would frustrate that Congressional Act. Petition at 17. However, in *Iowa Mutual*, this Court found that

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction."

Id. at 16.[3]

Petitioners also seek to avoid *National Farmers* and *Iowa Mutual* on the premise that those cases involved ongoing Tribal proceedings. They argue that since there were no Tribal proceedings here, exhaustion should not apply. The federal policies enumerated in *National Farmers* would not be served by such a crabbed application of the requirement.[4] Petitioners would have this Court create an exception that would destroy the rule; an

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[3] This Court has previously discredited identical arguments regarding federal question jurisdiction (*National Farmers* at 857) and diversity jurisdiction (*Iowa Mutual* at 17). In contradistinction, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *National Farmers* at 854.

[4] The three imperatives driving the exhaustion requirement are the federal policies of (1) "supporting tribal self-government and self-determination," (2) the fact that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed," and (3) to "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction" should further review be warranted. *National Farmers* at 856-857.

exception that sanctions a race-to-the-courthouse mentality and which, at the option of a claimant, can in every instance be used to defeat the rule.[5]

In a slight variation on this theme, Petitioners argue that exhaustion should not apply because it improperly elevates Tribal jurisdictional claims. Petition at 16-17. They argue that the state-law interests supporting abstention in *Younger v. Harris*, 401 U.S. 37 (1971), obviate the federal policies driving exhaustion. *Younger* defines one of the several judicial accommodations developed between the federal and state courts and does not address the judicial relationship between federal and tribal courts described in *National Farmers*. In a dispositive admission against interest, Petitioners concede that the policy driving *Younger* abstention simply "does not apply to tribes." Petition p. 17.

The District Court decision, summarily affirmed by the Ninth Circuit, adheres strictly to the *National Farmers* and *Iowa Mutual*. There is no conflict between the lower court and the decisions of this Court requiring exhaustion of Tribal remedies.

2. PETITIONERS RELY UPON INAPPLICABLE SUPREME COURT DECISIONS IN THEIR EFFORT TO LITIGATE THIS CASE DE NOVO.

Petitioner's litigation strategy denied the Federal and Tribal forums of the opportunity to develop findings of

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[5] The Circuit Courts have refused to accept identical arguments. *See Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405 (9th Cir. 1991), *cert. denied* 112 S.Ct. 1174 (1992) (hereafter "*Crawford*"); *see also, Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991).

fact and conclusions of law. As this Court said in *National Farmers*, challenges to Tribal jurisdiction require a "careful examination" and "detailed study" of the multitude of considerations inherent in an analysis of Tribal jurisdiction, including, *inter alia*, federal treaties, acts of Congress, and Executive policies, as well as issues of Tribal sovereignty, laws and regulations. *Id.* at 855-856. Yet, ironically, the Petition consists of legal arguments based entirely upon a foundation of treaty, laws, Executive policy, Tribal sovereignty and Tribal law and regulation that no court has even looked at in this matter.

From that fallacious foundation, Petitioners seek to precipitate a decision on the merits of their challenge to Tribal jurisdiction. They rely upon the decisions in *Montana v. United States*, 450 U.S. 544 (1981) (*"Montana"*), *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (*"Brendale"*) and *South Dakota v. Bourland*, ___ U.S. ___, 113 S.Ct. 2309 (1993) (*"Bourland"*).[6] Those cases are substantively and procedurally inapposite. Exhaustion was not at issue. Each one was heard by this Court only after the trial court developed a record and that record was reviewed by a Court of Appeals.[7] Petitioners are effectively seeking to

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[6] Petitioners also rely upon the criminal law cases of *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) and *Duro v. Reina*, 495 U.S. 676 (1990) to avoid exhaustion in this civil case. This Court has previously refused to do so, finding that if done, "any exhaustion requirement would be completely foreclosed because federal court would *always* be the only forum" for cases such as this. *National Farmers* at 854 (emphasis in original).

[7] For example, the *Bourland* Court noted that the district court engaged in, and the Court of Appeals did not disturb, a

lure this Court into conducting a trial de novo on a highly selective, yet skeletal, submission of materials in their Appendix and Petition that have not been subjected to authentication, examination, rebuttal or augmentation by any party, much less to judicial analysis.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), decided with the benefit of at least a partial trial court record, this Court refused to entertain questions of the constitutionality of a rent control ordinance. Absent a fully developed trial record, this Court found consideration of the merits of such a challenge to conflict impermissibly with "our admonition that 'the constitutionality of statutes ought not be decided except on an actual factual setting that makes a decision necessary.' " *Id.* at 10, citation omitted. The same reasoning applies here.

Simply put, this case is premature. It is not ripe for resolution by this Court. There is no actual factual record. Therefore, the district court was correct when, as Petitioners put it, the court "flatly refused" to address their unsupported assertions of constitutional injury. Petition at p. 13, note 13. While Petitioners may in the future

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factual determination that specific Reservation lands were either "open" or "closed" within the *Brendale* context. *Bourland* at 2316, note 9. Here the only judicially determined fact on the character of the Reservation lands at issue is that they are "fee" lands "within the exterior boundaries of the Reservation." *Middlemist* at 942 (Pet. App. A-3). The *Bourland* Court also noted that the district court made "extensive findings" that none of the Tribal jurisdictional parameters addressed in *Montana* existed to support the Cheyenne River Sioux Tribe's position. *Bourland* at 2320.

present a properly developed record for review by this Court, there is presently no record for review.

3. THE CIRCUIT COURTS OF APPEALS UNIFORMLY AGREE WITH THE EXHAUSTION REQUIREMENT OF *NATIONAL FARMERS* AND *IOWA MUTUAL*.

The Ninth Circuit's summary affirmance of the district court decision is in complete harmony with its prior rulings and those of the other circuits. The case of *Burlington Northern Railroad v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991) ("*BN v. Crow*"), a Montana case which preceded the *Middlemist* decision, is indistinguishable. There, as here, non-Indians challenged in federal court Tribal civil regulatory jurisdiction within the exterior boundaries of an Indian Reservation under the Declaratory Judgment Act. (28 U.S.C. § 2201). There, as here, plaintiffs willfully avoided available Tribal forums and sought relief in the first instance in federal court. And there, as here, the Ninth Circuit upheld the rulings in *National Farmers* and *Iowa Mutual* and required exhaustion of Tribal remedies over reservation affairs. It's little wonder that the District Court here found *BN v. Crow* to be "controlling in this case." *Middlemist* at 944. (Pet. App. A-9).

The *Middlemist* Court, relying upon the fact that this is a "reservation affair" (as that term is used by the *Iowa Mutual* Court at p. 16), followed a long line of Ninth Circuit decisions requiring exhaustion of Tribal remedies prior to attempting federal court review. *See, Crawford supra; FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir.), *cert. denied* ___ U.S. ___, 111 S.Ct. 1404 (1991); *Stock West v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (en banc);

United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992), and most recently, an unreported opinion in another exhaustion case arising on the Flathead Indian Reservation, *Hinshaw v. Mahler*, No. 93-35199, (9th Cir. June 17, 1994).

The Eighth Circuit decision in *Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation*, No. 93-3622, 1994 U.S. App. LEXIS 13564 (8th Cir. June 8, 1994) is analogous. There, petitioners raised a similar challenge to Tribal civil regulatory jurisdiction over non-Indians on "fee" Reservation lands. *Id.* at **12-**13. There, as here, petitioners attempted to raise arguments on the merits under the aegis of *Montana*, *Bourland* and *Brendale*. *Id.* at **12-**16. There, as here, petitioners failed to raise their challenge in the available Tribal forums and instead first sought relief in federal district court. The *Duncan* Court, just as the *Middlemist* Court, properly refused to address the merits and dismissed for failure to exhaust Tribal remedies. *Id.* at **16-**20.

The other Circuits are uniform in their adherence to the requirement of Tribal exhaustion for reservation affairs. The Court in *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied* 114 S.Ct. 621 (1993), clearly ratified the rule for reservation affairs. *Id.* at 812-814. However, based upon the judicial record, the Court determined that because the off-reservation contract dispute at issue did not qualify as a reservation affair and because the Tribe expressly consented to suit in state and federal court under the contract, exhaustion was not mandatory in that instance. *Id.* at 814-815.

The Tenth Circuit decision of *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991) strongly upholds Tribal exhaustion, finding, *inter alia*, that "[t]he fact that some of the

parties . . . are non-Indians is immaterial", *Id.* at 444, and quoting *National Farmers, supra*, for the rule that "Regardless of the basis for jurisdiction", if a federal complaint addresses a reservation affair and Tribal remedies were not exhausted, dismissal is required. *Id.* at 444.

Because the Circuit Courts uniformly adhere to Tribal exhaustion requirements over reservation affairs, certiorari is not warranted.

CONCLUSION

The *Middlemist* Court's strict adherence to the procedural requirements of exhaustion set forth in *National Farmers* and *Iowa Mutual*, coupled with complete uniformity in the Circuit Courts, confirms that this is a garden variety Tribal exhaustion case. It raises no special or important reasons for invoking the jurisdiction of this Court. It clearly sanctions no departure by a lower court from the accepted and usual course of judicial proceedings.

Certiorari should be denied.

Respectfully submitted this 3rd day of August, 1994.

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APPENDIX 1

Ordinance No. 87-A

AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

PART I

SHORT TITLE, AUTHORITY

Section 1. Short Title.

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

PART II

FINDINGS AND POLICY

Section 1. Findings.

The Tribal Council finds that:

a. The self-governing capabilities, political integrity, health and welfare, and economic security of the Tribes will be protected and enhanced by Tribal governmental control, regulation and protection of aquatic lands which are critical for the perpetuation of Reservation fisheries

and wildlife, the preservation of Reservation water quality, and the maintenance of the health, safety and welfare of Tribal members and thereby of all persons residing on the Reservation.

b. The Treaty of Hellgate July 16, 1855 (12 Stat. 975) reserved to the Confederated Salish and Kootenai Tribes (hereinafter the "Tribes") the exclusive right to hunt and take fish within the exterior boundaries of the Flathead Reservation. The exclusive Treaty right to hunt and fish within the Reservation confers upon the Tribes the right, duty and responsibility to protect those Tribal interests.

c. Reservation population growth and increased unregulated utilization of aquatic lands are causing adverse impacts upon the quality of Reservation waters, fisheries and wildlife habitat, and therefore, there exists an immediate need to regulate and manage the use of aquatic lands to preserve and protect them.

Section 2. Policy.

It is the policy of the Tribal Council to prevent the degradation of Reservation waters and aquatic lands by regulating construction or installation of projects upon aquatic lands whenever such project may cause erosion, sedimentation, or other distrubances [sic] adversely affecting the quality of Reservation waters and aquatic lands.

PART III

GENERAL PROVISIONS

Section 1. Definitions.

For the purposes of this Ordinance the following definitions will apply:

a. "Adjacent" means bordering, contiguous or neighboring. Wetlands separated from other Reservation waters by man-made dikes or barriers, natural river berms and the like are "adjacent wetlands."

b. "Administrator" means the chief executive officer of the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

c. "Aquatic Lands" means, all land below the mean annual high water mark of a Reservation water body.

d. "Board" means the Shoreline Protection Board of the Confederated Salish and Kootenai Tribes.

e. "Discharge of dredged material" means any addition or placement of dredged materials into Reservation waters or on aquatic lands whether through direct placement, or by secondary means such as run-off, slumping or overflow from a disposal site.

f. "Discharge of fill material" means any addition or placement of fill materials into Reservation waters or onto aquatic lands.

g. "Dredged material" means material that is excavated, displaced, or removed from aquatic lands.

h. "Fill material" means any material used for the purpose of replacing Reservation waters with dry land or dredged material.

i. "Mean Annual High Water Mark" means that line on the shore of Reservation waters established by the fluctuations of water and indicated by physical characteristics such as a clear, naturally occurring line impressed on the bank; shelving changes in the character of soil; paucity or lack of terrestrial vegetation; or the presence of water borne litter or debris.

j. "Office" means the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

k. "Person" means any individual, partnership, association, corporation, and any other entity composed of individuals, and governmental entities.

l. "Project" means a physical alteration of aquatic lands, wetlands, or Reservation waters, not otherwise exempted by this Ordinance or implementing regulations, which has the potential to cause a material change in the condition of such lands or water in contravention of the policy of this Ordinance, and includes but is not limited to dredging, filling, unregulated access detrimental to aquatic lands, irrigation diversions and returns, drainage ditches and construction on aquatic lands, and furthermore, includes maintenance or repair involving any of the above activities.

m. "Reservation waters" means:

(1) all naturally occurring bodies of water within the exterior boundaries of the Reservation regardless of alteration by man, including but not limited to lakes, rivers, streams (including intermittent streams), mudflats, wetlands, sloughs, potholes and ponds from which fish and wildlife are or could be taken, but does not include wholely [sic] manmade water bodies.

(2) tributaries of waters identified in subpart (1) above;

(3) wetlands adjacent to Reservation waters.

n. "Responsible person" means any person who undertakes a project or causes a project to be undertaken on aquatic lands.

o. "Tribal Council" means the duly elected governing body of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

p. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include but are not limited to swamps, marshes, bogs and similar areas.

Section 2. Administration.

The Shoreline Protection Board of the Tribes, as created by Ordinance 64A (Revised), shall have the powers and duties associated with implementation of this Ordinance and any regulations promulgated hereunder. The rights, responsibilities and immunities of the Board, and the Tribal Council, as specified in Ordinance 64A (Revised) remain unchanged.

Section 3. Water Rights.

This Ordinance shall not be construed to diminish or divest any existing water uses established in accord with applicable law.

Section 4. Regulations.

The Tribal Council may promulgate regulations to implement the provisions of this Ordinance upon recommendation of the Board. Regulations shall be promulgated pursuant to procedures contained in the Tribal Administrative Procedures Ordinance.

PART IV

PERMITS

Section 1. Permit Required.

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

Section 2. Permit Fees.

An application for a permit shall be accompanied by payment of a non-refundable fee to cover some costs associated with permit issuance and administration. The amount of the fee shall be fixed from time to time by regulation, shall take into account the scope of the proposal, and shall be reasonable.

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

b. The application shall be on a form provided by the Office and shall include, but is not limited to, a

location map, a specific description of the proposed project, the purpose and need for the project, practical alternative methods of implementing the project, and a plan specifying the type, quantity and source of materials to be used, means of access to the project area, the length of time necessary to complete the project, and the name, address and telephone number of the responsible person.

Section 4. Evaluation of Proposed Projects.

a. The Administrator of the Office shall review an application for a permit for adequacy and for project technical feasibility, shall determine if the proposal constitutes a project, and may make such on-site investigations as are necessary to perform these duties.

b. If the Administrator determines that the proposal is not a project the Administrator shall so state in a written notice to the person responsible for the project within 14 days of receipt of the application.

c. If the Administrator determines that the proposal is for a project, the Administrator shall bring the application before the Board at the next regularly scheduled Board meeting or may call a special Board meeting if circumstances so require.

d. The Board shall review all applications. The Board shall either approve, approve with modifications or alternatives, or disapprove an application and shall state its decision in writing to the responsible person.

e. Upon approval or upon approval with modification or alternatives, the Administrator shall forward to the responsible person a permit which shall relate to the

plan for the project approved by the Board, and which may include provisions for mitigation of adverse impacts associated with the project.

Section 5. Emergencies.

a. The provisions of this Section do not apply to emergency actions which are necessary to safeguard life or property during periods of immediate and substantial endangerment to life or property. The responsible person under this Section shall notify the Office in writing of the emergency undertaking within fifteen (15) days of commencement of such undertaking.

b. The Administrator shall make an on-site inspection of an action and cause a written report of such observations to be filed in with the Office and a copy shall be sent to the responsible person. The report shall include:

(1) a finding as to whether or not an emergency situation existed at the time the action was taken;

(2) a finding as to whether or not the action constitutes a project; and

(3) if the findings required in subparagraphs (1) and (2) above are affirmative, and a permanent solution is feasible, recommend in writing that the responsible person put the solution into effect within a specified reasonable amount of time pursuant to a duly issued permit. Failure of the responsible person to put the solution into effect is not a violation of this Section unless a substantially similar action arises from such failure to act.

Section 6. Modification or Revocation of Permit.

The Board may, upon a finding of non-compliance or upon a finding of necessity, either modify or revoke a permit after the responsible person has been afforded notice and an opportunity to be heard.

PART VI

ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized agent may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars for each day that the responsible person continues to engage in or maintains a non-conforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

PART VI [sic]

REVIEW, SEVERABILITY, EFFECTIVE DATE

Section 1. Administrative Appeal of Board Action.

A person aggrieved by a final action of the Administrator or the Board may seek review of such action pursuant to procedures contained in the Tribal Administratives [sic] Procedures Ordinance, Ordinance 86A. For purposes of administrative review, a decision of the Board shall constitute final agency action, appealable to an administrative law judge.

Section 2. Judicial Review.

a. The Tribal Court of the Confederated Salish and Kootenai Tribe shall have jurisdiction to hear and decide all causes arising under this Ordinance and implementing regulations and to hear appeals from agency actions upon exhaustion of administrative remedies.

b. The decision of the Tribal Court shall be final.

Section 3. Severability.

If any provision of this Ordinance or the applicability thereof is held invalid by any court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

Section 4. Effective Date.

This Ordinance shall become effective, pursuant to the terms of Article VI, Section 2 of the Tribes' Constitution, upon promulgation of implementing regulations by the Tribes.

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985. with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (l), (n), (t) and (u) of the Tribes Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James J. Steele
Vice-Chairman, Tribal Council

ATTEST:

/s/ Joseph E. Dupuis
Executive Secretary

APPROVAL:

_____

Title: _____
Bureau of Indian Affairs

Date: _____

APPROVED:
Donovan R. Boldt
SUPERINTENDENT

Received Office
of Superintendant

FINAL REGULATIONS FOR THE AQUATIC LANDS CONSERVATION ORDINANCE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

(December 5, 1986)

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PART V
ENFORCEMENT

Section 5.1 Violations.

The following actions shall constitute an act of non-compliance with these regulations and Ordinance 87A:

(1) commencement or initiation of a project without the responsible person first obtaining a permit; or

(2) continuation of work on an unpermitted project by any person; or

(3) failure to comply with the terms or conditions of a permit; or

(4) failure to comply with the terms and conditions of Ordinance 87A and these regulations; or

(5) failure to comply with orders of the Board.

Section 5.2 Notice of Non-compliance.

(a) When the Administrator has reason to believe that a violation of Ordinance 87A, these regulations, or any permit or order issued pursuant thereto has occurred, he shall issue a Notice of Non-Compliance. A Notice of Non-Compliance shall serve as a summons and compliant [sic] for purposes of the violation.

(b) A Notice of Non-Compliance shall advise the person to whom issued of the following information:

(1) there may exist an opportunity to cure alleged acts of non-compliance, and if so, the method and time for cure;

(2) that an Answer to the Notice must be made in writing and received by the Office within fifteen days of receipt of a Notice;

(3) the consequences of failing to Answer;

(4) the nature of each alleged violation;

(5) the type and amount of any fine or penalty that may be assessed for each alleged violation; and

(6) the date and place at which a hearing on each alleged violation will be held, if not cured, which shall not be less than thirty (30) days no more than sixty (60) days after the date of issuance of a Notice.

(c) A Notice of Non-Compliance shall be served either personally or by registered or certified mail.

Section 5.3 Answer.

(a) A person to whom a Notice of Non-Compliance has been issued shall answer within fifteen (15) days of the date of receipt of the Notice of Non-Compliance. Answer shall be made by mail and may be accompanied by a personal appearance before the Board or its designated agent.

(b) An Answer shall either admit or deny the violation, raise all affirmative defenses, and state whether or not the person in non-compliance will undertake curative measures, if any, specified in the Notice of Non-Compliance.

(c) If an Answer states that a person will undertake curative measures that may be specified in the Notice, the hearing scheduled in the Notice may be held in abeyance for a reasonable amount of time to enable the curative measures to be completed. If curative measures are completed in a reasonable amount of time and to the satisfaction of the Administrator the hearing may be cancelled at the discretion of the Administrator. Satisfactory completion of curative measures does not obviate imposition of other fines or penalties if a reasonable basis exists for their imposition.

Section 5.4 Contested Cases.

(a) A hearing for the resolution of a contested case shall be held pursuant to the procedures contained in Ordinance 86A of the Confederated Salish and Kootenai Tribes, the Tribal Administrative Procedures Ordinance

(hereafter called "TAPO"). As applied to this Ordinance the "chief executive officer" referenced in PART VI Section 23 of TAPO shall be the Board.

(b) The provisions of TAPO shall provide the procedures for administrative and judicial review of all contested cases arising under this Ordinance.

(c) If a contested case involves a significant public interest the Board may, on its own motion, solicit public comment. The Board may condition or limit public comment as is necessary for prudent administration of these regulations. In the event that the Board determines public input is necessary it may toll any time frames contained in these regulations for the duration of the public comment period.

Section 5.5 Penalties.

Upon a finding that the person served with a Notice of Non-Compliance has committed a violation of Ordinance 87A, these regulations, a condition of a permit, or an order of the Board, any or all of the following penalties may be assessed and ordered:

(1) revocation of an applicable permit;

(2) removal of the project and restoration of the underlying property;

(3) imposition of a monetary fine;

(4) prescription of remedial measures.

Section 5.6 Actions to Enforce.

The Administrator may institute in Tribal Court, under the procedures there applicable, a civil action to collect against any person who has been ordered to pay a penalty or perform remedial measures pursuant to these regulations and who has not appealed such decision or who has not paid an assessed fee, cost, or penalty.

Section 5.7 Revocation of Permit and Restoration of Permit Area.

(a) In addition to revocation of a permit the responsible person may be ordered to remove a project and to restore the area surrounding and underlying the project.

(b) Removal of a project and restoration of the surrounding area must be accomplished within sixty (60) days of of [sic] an order directing such action, except that the Board or Court may, on its own initiative, or upon application of the responsible person, delay the removal and restoration for up to twelve months if it is determined that such delay would reduce the likelihood of environmental damage resulting from such removal and restoration.

Section 5.8 Failure to Comply With an Order to Remove.

(a) In the event that a person responsible for a project fails to comply with an order directing removal and restoration, the Board, after the lapse of a sixty-day grace period, may undertake the removal of the project and restoration of the underlying property on its own

initiative, and may assess the responsible person for the costs of such work.

(b) The Administrator must notify the responsible person by mail at least five (5) days in advance of the planned enforcement action that it plans to remove the project and perform any necessary restoration.

Section 5.9 Fines.

(a) Any person responsible for a project constructed or maintained contrary to the provisions of Ordinance 87A, these regulations, or the terms of a permit shall be subject to a penalty of not less than twenty-five dollars ($25) or more than five hundred dollars ($500) for each act of non-compliance.

(b) Each day during which an act of non-compliance shall continue shall be considered a separate violation of these regulations and of Ordinance 87A.

(c) Nothing in these regulations will be interpreted to deny the use of other civil remedies available under Tribal or federal law.

(5)

Supreme Court, U.S.
FILED
OCT - 7 1994
OFFICE OF THE CLERK

No. 94-42

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROSS MIDDLEMIST, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of ongoing tribal proceedings, an action challenging the Confederated Salish and Kootenai Tribes' authority to regulate nonmembers' activities that affect aquatic lands on the Flathead Indian Reservation was properly dismissed pending exhaustion of tribal remedies.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-42

ROSS MIDDLEMIST, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A17) is reported at 19 F.3d 1318. The opinion of the district court (Pet. App. A1-A15) is reported at 824 F. Supp. 940.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1994. The petition for a writ of certiorari was filed on July 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Confederated Salish and Kootenai Tribes are federally recognized Indian Tribes. They occupy the Flathead Reservation, which was established by the 1855 Treaty of Hell Gate, 12 Stat. 975, in what is now the State of Montana. The Reservation includes part of Flathead Lake, a navigable body of water roughly 26 miles long and up to 5 miles wide.

On December 13, 1985, the Tribal Council for the Confederated Tribes approved Tribal Ordinance 87A, also known as the Aquatic Lands Conservation Ordinance (ALCO) (*reproduced at* C.A. E.R 64-74). Pet. App. A2, A40-A42. ALCO is a civil regulatory ordinance designed to implement the tribal and federal goals of protecting the Reservation's aquatic habitat, upon which depend the fish and wildlife resources reserved to the Confederated Tribes by treaty. See *Confederated Salish & Kootenai Tribes of Flathead Reservation* v. *Namen*, 665 F.2d 951, 964-965 (9th Cir.), cert. denied, 459 U.S. 977 (1982); *Joint Board of Control of Flathead* v. *United States*, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988).

The Secretary of the Interior approved ALCO on December 20, 1985. Pet. App. A2. Shortly thereafter the Confederated Tribes issued proposed implementing regulations for public review and comment. *Ibid.* The final regulations were promulgated in accordance with the Tribal Administrative Procedures Ordinance, a tribal law approved by the Secretary that closely parallels the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See Pet. App. A2. None of the petitioners in this case sought to challenge the regulations during this notice and comment period. *Id.* at A2-A3.

ALCO is administered by the Shoreline Protection Board (Board), a tribal board that includes both Indians

and non-Indians who reside on the Flathead Reservation. ALCO and its implementing regulations establish a tribal administrative review and permitting process applicable to all persons—tribal members and nonmembers—who wish to engage in projects that have the potential to cause a material change in the condition of Reservation waters, wetlands, or aquatic lands, as those terms are defined in ALCO. See ALCO Pt. III, § 1(c), (m) and (p) (see C.A. E.R. 66, 68). The activities covered by ALCO include (but are not limited to) dredging, filling, unregulated access detrimental to aquatic lands, irrigation diversions and returns, drainage ditches, and construction on aquatic lands. ALCO contains specific exceptions to the general applicability of ALCO. See ALCO Pt. IV, § 5 (see C.A. E.R. 71); Final Regulations for ALCO Pt. III, § 3.3 (see C.A. E.R. 84).

Proposed undertakings are reviewed by an interdisciplinary team of professionals, and a determination is made as to the applicability of ALCO and the propriety of a permit. Between 1987 and 1991, 315 ALCO permit applications were processed by the Board and 297 permits were issued. C.A. E.R. 61. Any person aggrieved by a final action of the tribal government is entitled to seek administrative review pursuant to procedures contained in the Tribal Administrative Procedures Ordinance. That process involves review by the Board, whose decision is appealable to an administrative law judge. Upon exhaustion of administrative remedies, judicial review is available in the Tribal Court of the Confederated Salish and Kootenai Tribes. See ALCO Pt. VI (see C.A. E.R. 73-74).

2. Petitioners Ross Middlemist and Wayne W. Maughan are non-Indians who own ranch or farm land on the Reservation and who wish to engage in activities that may physically alter aquatic lands, wetlands, or

Reservation waters. Pet. App. A22-A28. Petitioner Flathead Joint Board of Control is comprised of elected representatives of three Irrigation Districts—the Flathead, Mission, and Jocko Valley Districts—served by the Flathead Irrigation and Power Project. *Id.* at A22. On November 6, 1991, petitioners brought this action in federal district court. *Id.* at A19-A39 (Complaint). The Complaint alleged that Middlemist and Maughan have begun the process of applying for, or intend to apply for, requisite permits from federal, state, and local agencies. See *id.* at A24-A28. The Complaint further alleged that Middlemist and Maughan were informed by those agencies that an ALCO permit would also be required. *Id.* at A24-A25, A28. Petitioners sought declaratory and injunctive relief barring the tribal government from applying ALCO to any activities carried on by non-tribal entities on fee lands. *Id.* at A38. Petitioners also named as defendants officials in the Department of the Interior, alleging that the Department had acted unlawfully in approving ALCO and in providing funding to develop, implement, and enforce the Ordinance. *Id.* at A37-A38, A39. Neither Middlemist nor Maughan applied for a tribal permit or initiated an administrative or judicial challenge in tribal forums. *Id.* at A25, A28.

3. Respondents moved to dismiss the suit, arguing, *inter alia*, that petitioners had failed to exhaust tribal administrative and judicial procedures available to challenge the Confederated Tribes' authority over the activities in question. Relying on *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987), and on Ninth Circuit decisions construing those precedents, the district court dismissed petitioners' action without prejudice pending exhaustion of available

tribal remedies. The court explained that because the case arose on the Reservation, directly implicated tribal government interests, and named tribal officials as defendants, the dispute was "[u]nquestionably" a "reservation affair" subject to the requirement that petitioners exhaust available tribal remedies. Pet. App. A8. Relying on *Crawford* v. *Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), cert. denied, 112 S. Ct. 1174 (1992), the court rejected petitioners' contention that the absence of an ongoing tribal proceeding rendered exhaustion principles inapplicable. Pet. App. A6-A7. The court also found that none of the exceptions to the exhaustion doctrine set forth in *National Farmers Union*, 471 U.S. at 856 n.21, were applicable in this case. Pet. App. A12-A13.[1]

4. Petitioners filed a petition for a writ of certiorari before judgment, which was denied by this Court. 113 S. Ct. 2950 (1993). The court of appeals subsequently affirmed the judgment of the district court "on the basis of its well-reasoned published opinion." Pet. App. A17.

ARGUMENT

The court of appeals' holding that exhaustion of tribal remedies is required in the circumstances of this case is

[1] The district court also rejected petitioners' argument that exhaustion was impossible because the tribal court would lack jurisdiction over the federal defendants. Pet. App. A13. The exhaustion requirement would be satisfied, the court held, if petitioners pursued their tribal remedies against the tribal defendants. *Id.* at A14. The court noted that "[t]he issues concerning the Federal Defendants in this case are the same basic issues underlying the rest of the action," and that the record developed in tribal proceedings would be directly relevant to the district court's ultimate resolution of the claims against the federal defendants. *Ibid.*

correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 14) that this Court's decisions in *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987), were "clearly premised upon the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971)." Noting that "[t]he central and continuing requirement for abstention in the *Younger* context is that there is an ongoing state proceeding," petitioners argue (Pet. 15) that the principles articulated in *National Farmers Union* and *Iowa Mutual* are inapplicable in the absence of an ongoing tribal proceeding. That argument is unpersuasive and does not warrant review.

a. There is no conflict among the circuits on this issue. In a case challenging tribal authority over nonmembers, the Eighth Circuit recently held that tribal remedies must be exhausted notwithstanding the absence of ongoing tribal court proceedings. *Duncan Energy Co.* v. *Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1299-1301 (1994). The Tenth Circuit has likewise held that the tribal exhaustion requirement applies in the absence of an ongoing proceeding, see *Smith* v. *Moffett*, 947 F.2d 442, 444 (1991), as has the Ninth Circuit in other cases. See *Crawford* v. *Genuine Parts Co.*, 947 F.2d 1405, 1407 (1991), cert. denied, 112 S. Ct. 1174 (1992); *Burlington Northern R.R.* v. *Crow Tribal Council*, 940 F.2d 1239, 1244-1247 (1991). There is consequently no need for intervention by this Court to resolve any disagreement among the courts of appeals.

b. The decision of the court of appeals is fully consistent with this Court's precedents. Although both

National Farmers Union and *Iowa Mutual* involved ongoing proceedings in tribal court, this Court did not suggest that the pendency of such proceedings was a necessary prerequisite to the application of exhaustion principles. Nor is there any basis for petitioners' assertion that *Younger* abstention furnished the model upon which this Court's tribal exhaustion decisions were based. *Younger* itself was not cited in either *National Farmers Union* or *Iowa Mutual*. Only one *Younger* abstention case was cited in either of those decisions, see *National Farmers Union*, 471 U.S. at 856 n.21 (citing *Juidice* v. *Vail*, 430 U.S. 327, 338 (1977)); and *Juidice* was cited only as support for an exception to the tribal exhaustion rule where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith. *National Farmers Union*, 471 U.S. at 856 n.21.

Indeed, the doctrine articulated in *National Farmers Union* and *Iowa Mutual* is not one of "abstention" at all; it is one of "exhaustion" of tribal remedies. See *National Farmers Union*, 471 U.S. at 857; *Iowa Mutual*, 480 U.S. at 19. That difference is more than semantic. This Court's tribal exhaustion cases expressly contemplate the prospect of subsequent proceedings in federal district court. See *National Farmers Union*, 471 U.S. at 857 ("exhaustion is required before * * * a claim may be entertained by a federal court"); *Iowa Mutual*, 480 U.S. at 19 ("If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court."). Where *Younger* abstention principles apply, by contrast, disputed questions of federal law must be submitted to the state courts *rather than* to the federal district courts, with federal court review available, if at all, only in this Court. See *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 18

(1987) ("If, and when, the Texas courts render a final decision on any federal issue presented by this litigation, review may be sought in this Court in the customary manner.").

c. This Court's tribal exhaustion cases do not directly address the question whether exhaustion is required in the absence of pending tribal proceedings. The principles underlying those decisions have considerable force, however, even where no formal proceeding is ongoing in a tribal forum. This Court in *National Farmers Union* emphasized that (1) Congress is committed to a policy of supporting tribal self-government and self-determination, which favors allowing a tribal forum the first opportunity to evaluate the factual and legal bases for the challenge to its jurisdiction; (2) the orderly administration of justice in the federal court will be served by allowing a full record to be developed in tribal court; and (3) the exhaustion requirement will encourage tribal courts to explain to parties the precise basis for accepting jurisdiction and will provide other courts with the benefit of their expertise in such matters. 471 U.S. at 856-857. The *Iowa Mutual* Court also cited the federal policy of encouraging the development of tribal self-government and noted the "vital role" of the tribal courts. 480 U.S. at 14. The Court warned that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16.

Even in the absence of a pending tribal proceeding, application of an exhaustion requirement significantly furthers the ends identified in this Court's prior decisions. The exhaustion rule assists in the development of tribal self-government by ensuring that questions of tribal law, and of the limits imposed by

federal law on tribal authority,[2] are addressed in the first instance by the tribe itself. The rule also ensures that any subsequent examination by a federal court of the plaintiff's federal-law challenge to the exercise of jurisdiction by the tribe will be conducted with the benefit of the expertise of the tribal court—and, in the present context, the tribal administrative agency whose potential exercise of authority is being challenged.[3]

d. Petitioners also assert (Pet. 16-17) that the court of appeals' decision is wrong because it accords greater deference to tribal courts than to state courts. In fact, no anomaly exists. In limiting *Younger* abstention to cases involving pending state proceedings, this Court has acted in light of Congress's provision of an express federal cause of action available in federal court to redress state officials' deprivation of federal rights. See *Steffel* v. *Thompson*, 415 U.S. 452, 472-473 (1974) ("When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has

[2] In the context of judicial challenges to federal agency action, the rule that a plaintiff may not seek judicial relief until he has exhausted his administrative remedies "has been repeatedly acted on in cases where * * * the contention is made that the administrative body lacked power over the subject matter." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); see also *Ticor Title Insurance Co.* v. *FTC*, 814 F.2d 731, 739 (D.C. Cir. 1987) (general rule of exhaustion "has frequently been applied even where the plaintiffs have challenged the very authority of the agency to conduct proceedings").

[3] As noted above, this Court's decisions in *National Farmers Union* and *Iowa Mutual* contemplate the opportunity to challenge a tribal court's jurisdiction in federal court after tribal remedies have been exhausted.

assigned to the federal courts to protect constitutional rights."). Congress has not similarly given parties claiming that tribal authorities have exceeded their jurisdiction a right to choose to initiate litigation to decide that question in federal court. In the absence of a federal statute manifesting congressional intent that initial access to federal court be available for a particular party or class of cases,[4] the courts have greater latitude to impose an exhaustion requirement as a matter of sound judicial administration in support of Congress's strong policy of supporting tribal sovereignty and self-determination. Cf. *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2543-2544 (1993).

2. Petitioners also assert (Pet. 18-23) that where neither a treaty nor a federal statute provides a textual source for a tribe's assertion of regulatory jurisdiction over nonmembers, the federal courts may not require nonmembers to exhaust tribal remedies before gaining access to the federal forum. Petitioners contend (Pet. 21) that a trilogy of this Court's decisions has established the rule that "when Congress has by statute opened reservation land to nonmember entry and acquisition, there is no basis, either in a treaty or in a tribe's inherent sovereignty, for the lawful exercise of jurisdiction over nonmember land use." The three cases on which petitioners rely are *Montana* v. *United States*, 450 U.S. 544 (1981); *Brendale* v. *Confederated Tribes &*

[4] See, *e.g.*, 28 U.S.C. 1345 ("the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States"); 42 U.S.C. 2000e-5(f) (person aggrieved by prohibited discrimination may file suit in federal district court after filing charge with Equal Employment Opportunity Commission).

Bands of Yakima Indian Nation, 492 U.S. 408 (1989); and *South Dakota* v. *Bourland*, 113 S. Ct. 2309 (1993).

Contrary to petitioners' assertion, this Court's decisions do not establish that Congress, in opening the Flathead Reservation to nonmembers, abrogated all sovereignty of the Confederated Tribes over nonmembers. In *Montana* v. *United States*, 450 U.S. at 566, the Court recognized that

> [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

This inherent power includes the right to exercise civil authority over conduct that involves the Confederated Tribes' water rights. *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42, 52 (9th Cir.) (citing *Montana* v. *United States*, 450 U.S. at 566 n.15 ("Indian tribes retain rights to river waters necessary to make their reservations livable")), cert. denied, 454 U.S. 1092 (1981); see also *Felix S. Cohen's Handbook of Federal Indian Law* 587 (1982 ed.) ("Indian reserved water rights probably are protected against impairment of water quality as well as diminutions in quantity"). ALCO protects the Confederated Tribes' aquatic resources; it is not a land use statute. The activities of the individual petitioners are potentially subject to ALCO because they involve discharges into aquatic resources.[5] Thus, the Confederated Tribes' assertion of

[5] Wetlands are part of the navigable waters federally regulated under the Clean Water Act because disturbance of wetlands may have a profound influence on water quality. See *United States* v.

jurisdiction is not, as petitioners contend, without any facial validity. Petitioners concede (Pet. 22) that the *Montana* exceptions may permit the application of ALCO to nonmembers even if federal homestead mineral and townsite laws abrogated the Confederated Tribes' general authority to regulate nonmember land use on the Flathead Reservation. Petitioners provide no support, however, for their assertion (Pet. 22) that exhaustion of tribal remedies cannot be required in cases in which the issue is the application of the *Montana* exceptions. See *Duncan Energy*, 27 F.3d at 1301 & n.6 (exhaustion of tribal remedies is required so that the applicability of the *Montana* exceptions may be addressed, in the first instance, by tribal authorities).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1994

Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985). The Confederated Tribes' regulation of activities under ALCO shares this direct connection to the Tribes' water resources.

No. 94-42

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In The
Supreme Court of the United States
October Term 1994

ROSS MIDDLEMIST, et al.,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, Bruce Babbitt, et al.,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF OF AMICI CURIAE STATES OF MONTANA, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, FLORIDA, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, UTAH AND WISCONSIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The amici curiae States, through their respective Attorneys General, respectfully submit a brief pursuant to S. Ct. R. 37.2 in support of the petition for writ of certiorari.

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INTEREST OF THE AMICI STATES

The federal judiciary has long had primary responsibility for resolving disputes over state and tribal regulatory authority in Indian country. Most of these disputes have involved the permissible scope of state jurisdiction, but, especially more recently, the Court has been called upon to determine the reach of tribal regulatory power. "In all of these cases, the governing rule of decision has been provided by federal law." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). The central question here is whether, when tribal power is contested, the exercise of federal question jurisdiction under 28 U.S.C. § 1331 should be conditioned on the challenger's first invoking and exhausting tribal administrative and judicial remedies.

The amici States have two substantial interests in how that question is answered. The first is quite practical. Jurisdictional controversies between tribes and States are common. Many are resolved without litigation, but access to a federal court for timely injunctive or declaratory relief can be critical. Although the exhaustion requirement adopted by the courts below presumably will have no effect on a tribe's invoking federal jurisdiction to vindicate the existence of inherent regulatory authority, it can serve to deny States or other nontribal entities a ready federal forum to resolve disputes over tribal regulatory authority. It is a suspect rule which accords one group of litigants the right to immediate federal relief for the purpose of

establishing a power but denies another group such right for the purpose of contesting that power. The second interest is related to the first but goes beyond the mere practical to the federal judiciary's obligation to exercise the jurisdiction over cases or controversies invested in it by Congress. The courts below have extrapolated from *National Farmers Union* and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), the conclusion that any dispute with a tribe or tribal member over "reservation affairs" is subject to exhaustion. That reading distorts the reasoning of those decisions and creates an anomalous exception to the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). In the context of federal-state relations, principles of federalism or judicial efficiency have counseled abstaining from or deferring the exercise of § 1331 jurisdiction in certain instances, yet even those principles have never cut so deeply into that exercise as the exhaustion doctrine fashioned below. The amici are troubled that "an Indian tribe's [administrative law and] judicial system is entitled to a greater degree of deference than the [administrative law and] judicial system of a sovereign State." *Iowa Mutual*, 480 U.S. at 22 (Stevens, J., concurring & dissenting).

SUMMARY OF THE ARGUMENT

The Court has considered and resolved claims relating to the inherent civil regulatory power of Indian tribes over reservation-based conduct of nonmembers without requiring exhaustion of tribal adjudicatory remedies. *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,

492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981). Its decision in *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985), did not mark a watershed break in this practice but, instead, established only a requirement that, when a tribe's civil adjudicatory power in an ongoing tribal court proceeding is challenged, the exercise of jurisdiction under 28 U.S.C. § 1331 to entertain such claim ordinarily must await conclusion of its presentation to and resolution by the tribal court.

The decisions below expand the *National Farmers Union* exhaustion doctrine to encompass any claim questioning the existence of a tribe's civil regulatory authority over nonmember conduct or lands because such claim is deemed to implicate "reservation affairs." The term "reservation affairs" is taken from *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). There, the Court deferred exercise of diversity jurisdiction over an insurance contract-interpretation claim integrally related to causes of action filed against the federal court plaintiff in a preexisting tribal court proceeding. *Iowa Mutual*, like *National Farmers Union*, represents a limited incursion into the ordinary duty of federal courts to exercise congressionally conferred jurisdiction, not a wholesale repudiation of that duty.

Not only is there no Indian law decisional authority from this Court justifying the decisions below, but they also find no analogue in *Younger v. Harris*, 401 U.S. 37 (1971), *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), or their progeny. These decisions seek as a general matter to avoid federal courts' interfering with or duplicating state judicial proceedings. Whatever their precise scope, they do not provide an analytical basis for exhaustion where only a federal law-based claim is involved

and no tribal administrative or judicial proceedings have been commenced.

The Court has stressed repeatedly the federal judiciary's "virtually unflagging obligation" to exercise its jurisdiction. *Colorado River*, 424 U.S. at 817. "Underlying [that obligation] is the undisputed constitutional principle that Congress, and not the judiciary, defines the scope of federal jurisdiction with the constitutionally permissible grounds." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). Federal courts have no dispensation from this general rule merely because a claim challenges a tribe's civil regulatory authority over nonmembers. Unimpeded access to a federal forum is instead particularly essential in such cases because federal courts often provide the only forum in whose impartiality tribes and nonmembers alike repose confidence. The Petition thus presents an important question over the scope of the *National Farmers Union* exhaustion doctrine--a question which should be decided now.

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ARGUMENT

I. *NATIONAL FARMERS UNION* ESTABLISHED A NARROW EXCEPTION TO THE ORDINARY OBLIGATION OF FEDERAL COURTS TO EXERCISE JURISDICTION UNDER 28 U.S.C. § 1331 WHEN PROPERLY INVOKED.

While the Court's decisions concerned with tribal regulatory jurisdiction over nonmembers date back 90 years (*Morris v. Hitchcock*, 194 U.S. 384 (1904)), *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985), was the first case in which the issue of tribal civil

adjudicatory jurisdiction over nonconsenting nonmembers was raised. Two questions were presented in *National Farmers Union*: whether jurisdiction under 28 U.S.C. § 1331 existed with respect to a claim by an insurance company and its insured, a state school district, that a tribal court lacked subject matter jurisdiction to enter and enforce a judgment against the district in an ongoing personal injury action, and, if § 1331 jurisdiction did exist, whether tribal adjudicatory jurisdiction was present. Reversing the court of appeals' contrary conclusion, the Court held that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Id.* at 852. It nonetheless further held that the exercise of § 1331 jurisdiction should be stayed to "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge" and that only after the federal court plaintiffs' exhaustion of "the remedies available to them in the Tribal Court system" should a federal court address the merits of their challenge. *Id.* at 856, 857. The exhaustion requirement announced in *National Farmers Union* therefore derived directly from a determination that it would be inappropriate to interfere with enforcement of a tribal court judgment, and the associated proceedings to determine its validity, until such court had been given an opportunity to consider the federal court plaintiffs' jurisdictional challenge.

Nothing in *National Farmers Union* suggests it was intended to usher in a new era of federal courts' deferring to tribal administrative and judicial processes all challenges to a tribe's regulatory jurisdiction, even when there exist no tribal proceedings in which the federal court plaintiff is a party or in privity with a party. The subsequent decision in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9

(1987), similarly did not mark a sea-change in the exercise of federal jurisdiction. *Iowa Mutual* differed from *National Farmers Union* because it involved not a challenge to tribal court jurisdiction but a federal diversity action commenced by an insurance carrier to litigate an issue related to liability asserted against it in an ongoing tribal court proceeding. The Court concluded that deferring exercise of federal jurisdiction was appropriate because, "[a]s *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.'" *Id.* at 17. Although *Iowa Mutual* was distinguishable from *National Farmers Union* in important respects (*id.* at 20 (Stevens, J., concurring & dissenting)), it nevertheless was aimed specifically at protecting the integrity of tribal court proceedings initiated before the federal action.[1]

II. THE LOWER COURTS' APPLICATION OF THE *NATIONAL FARMERS UNION* EXHAUSTION REQUIREMENT TO THE PETITIONERS' CLAIMS CONSTITUTES A SUBSTANTIAL

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[1] Although not germane for present purposes, the difference between *National Farmers Union* and *Iowa Mutual* is significant. *National Farmers Union* was a true exhaustion case because the only issue--the existence of tribal adjudicatory jurisdiction--remained subject to relitigation upon conclusion of the tribal court action. In *Iowa Mutual*, however, the insurance contract interpretation issue--the sole claim raised in the diversity suit--could never be entertained unless there was a subsequent determination that the tribal court judgment was void for lack of adjudicatory jurisdiction. *Iowa Mutual*, 480 U.S. at 19. Consequently, despite the Court's remark that "the exhaustion rule announced in *National Farmers Union* applies here as well" (*id.* at 16), *Iowa Mutual*, by committing the merits of the insurance contract dispute to potentially unreviewable tribal court determination, embodies more than a simple exhaustion rule.

EXPANSION OF THAT REQUIREMENT, HAS NO DECISIONAL ANALOGUE AND RAISES A SIGNIFICANT QUESTION CONCERNING THE SCOPE OF THE FEDERAL JUDICIARY'S AUTHORITY TO WITHHOLD EXERCISE OF OTHERWISE PRESENT JURISDICTION.

A.

The courts below have broadened the reach of the *National Farmers Union* exhaustion doctrine to encompass jurisdictional challenges unrelated to an ongoing tribal adjudicatory proceeding. The District Court relied principally on *Burlington Northern Railroad Company v. Crow Tribe*, 940 F.2d 1239 (9th Cir. 1991), and *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1174 (1992), for the proposition that, because the Petitioners' challenge implicates the question whether the Confederated Salish and Kootenai Tribes retain inherent authority to enforce their Aquatic Lands Conservation Ordinance against nonmember landowners, it constitutes "a 'reservation affair' which triggers the mandatory exhaustion requirement." *Middlemist v. Secretary*, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994). That the Petitioners' claim did not bring into question the jurisdiction of any tribal adjudicatory entity in an ongoing proceeding was deemed immaterial.

The Court of Appeals' summary affirmance approved the District Court's application of *Burlington Northern* and *Crawford*. In the first of those cases, the Ninth Circuit required *National Farmers Union* exhaustion with respect to a railroad's claim that a tribe lacked regulatory authority to enforce a common carrier ordinance against its reservation-based activities. The court found unmeaningful the fact that no tribal administrative or

judicial proceedings had commenced, reasoning that, "[i]f . . . [the railroad] suffers from a justiciable imposition of Crow sovereign authority, then its position is substantively no different from the non-Indian defendants forced to exhaust tribal remedies before seeking relief in federal court." *Burlington Northern*, 940 F.2d at 1246. *Crawford* did not arise from a challenge to tribal regulatory or adjudicatory jurisdiction but, like *Iowa Mutual*, presented the question whether a federal court should exercise its diversity jurisdiction over a products liability suit arising from a reservation automobile accident. Notwithstanding the fact that the injured parties had initiated a state court action which had then been removed to federal court and no tribal court proceeding existed, the court of appeals found the district court erred in not "dismiss[ing] or abstain[ing] in favor of tribal court proceedings" (947 F.2d at 1409) when the plaintiffs filed a request shortly before trial for "transfer" of the cases to tribal court (*id.* at 1407). The court stated that in *National Farmers Union* and *Iowa Mutual* "the Supreme Court announced that principles of comity required federal courts to dismiss or to abstain from deciding cases in which concurrent jurisdiction in an Indian tribal court was asserted" and that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant." *Id.*; *accord Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc) (directing district court to abstain from exercising diversity jurisdiction over legal malpractice and false representation claim against tribal attorney "because colorable questions are presented in this civil action regarding whether the Colville Tribal Courts have concurrent jurisdiction over alleged tortious conduct that may have commenced on the reservation"); *Duncan Energy Co. v. Three Affiliated Tribes*, 1994 WL 244341 (8th Cir. June 8, 1994) (directing *National Farmers Union* exhaustion as to claim that tribes lacked inherent authority to impose property and gross production taxes or to require nontribal employers to extend hiring preferences to

qualified Indians even in the absence of any ongoing tribal adjudicatory proceeding); *but see Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir.) (refusing to require *Iowa Mutual* deferral in diversity action where, inter alia, "there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law"), *cert. denied*, 114 S. Ct. 621 (1993).

B.

The decisions below and the Ninth Circuit precedent on which they are grounded view themselves as so squarely falling within the scope of the *National Farmers Union* exhaustion doctrine as not to require careful consideration of the "virtually unflagging obligation [of federal courts] . . . to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). *National Farmers Union* nonetheless does not stand for the proposition that, merely because a federal court plaintiff challenges a tribe's regulatory jurisdiction, exhaustion of tribal administrative and judicial remedies must occur absent any exception to the exhaustion requirement. *See National Farmers Union*, 471 U.S. at 856 n.21. Accepting such a broad reading of *National Farmers Union* effectively would foreclose immediate federal court access in a class of cases as to which § 1331 jurisdiction indisputably exists and over which federal courts routinely have exercised such jurisdiction. *E.g., South Dakota v. Bourland*, 113 S. Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981).

Here, the sole justification for application of the *National Farmers Union* exhaustion rule is vindication of

tribal self-government and self-determination interests. *Burlington Northern*, 940 F.2d at 1245-46.[7] To use those interests as the basis for broadening the exhaustion doctrine, however, loses sight of the notion that in *National Farmers Union* "the policy of supporting tribal self-government and self-determination" was defined only as "favor[ing] a rule that would provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 471 U.S. at 856. The self-government interest at stake in *National Farmers Union* was the tribal court's right to complete adjudication before review of its jurisdictional determination by a federal court. Instantly, the Tribes have asserted their inherent governance powers by enacting the Aquatic Lands Conservation Ordinance which unambiguously extends to the individual Petitioners' lands, and compliance with that ordinance has been required by the Army Corps of Engineers as a condition to obtaining a dredge and fill permit under the Water Pollution Prevention and Control Act, 33 U.S.C. § 1344. It is one thing to say that, once sued in tribal court, a litigant ordinarily must complete that adjudicatory process before seeking to void the tribal court's actions on jurisdictional grounds, but it is quite another to require a litigant to invoke a tribe's

[7] The two other justifications for exhaustion -judicial efficiency and "encourag[ing] tribal courts to explain to the parties the precise basis for accepting jurisdiction" (*National Farmers Union*, 471 U.S. at 857) -do not apply when no tribal adjudicatory proceedings are ongoing and only federal law questions are presented. Deferring exercise of § 1331 jurisdiction under those circumstances promotes delay, not efficiency, since initiation of a separate administrative or judicial proceeding in a different forum is necessary. "'Procedural nightmares'" (*id.* at 856) are unlikely to occur in a single, federal action. Where a tribal court has not exercised jurisdiction, the third justification similarly has no play. The "benefits of tribal explanations and expertise" (*Burlington Northern*, 940 F.2d at 1246) can be brought to bear in the federal proceeding in support of the position that, as a matter of federal law, tribal civil regulatory authority exists.

regulatory or adjudicatory jurisdiction for the purpose of arguing that such jurisdiction does not exist. The latter proposition makes no sense and, unsurprisingly, finds no support in a fair reading of *National Farmers Union* or *Iowa Mutual*.

The Court of Appeals' expansion of the exhaustion requirement not only outstrips the analytical reach of *National Farmers Union* but also finds no counterpart in other decisional authority concerned with appropriate exercise of federal jurisdiction. The most closely analogous of such authority is that alluded to in *National Farmers Union* abstention in accord with principles derived from *Younger* v. *Harris*, 401 U.S. 37 (1971)–and in *Iowa Mutual*–deferral in accord with principles derived from *Colorado River*. *National Farmers Union*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 16 n.8. With respect to *Younger*, the Court has said:

> Under *Younger*-abstention doctrine interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests. . . . *Younger* abstention is required, however, only when state court proceedings are initiated "before any proceedings of substance on the merits have taken place in the federal court." . . . In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

Hawaii Housing Auth. v. *Midkiff*, 467 U.S. 229, 237-38 (1984); *accord Ankenbrandt* v. *Richards*, 112 S. Ct. 2206, 2216 (1992) ("[t]hough we have extended *Younger*

abstention to the civil context. . . . we have never applied the notions of comity so critical to *Younger*'s 'Our Federalism' when no state proceeding was pending nor any assertion of important state interests made"); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987) ("Both *Juidice* [*v. Vail*, 430 U.S. 327 (1977)] and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand") (footnote omitted); *see generally* Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 349 (2d ed. 1990) ("Perhaps the strongest of the four reasons for *Younger* deference is the desire to avoid interference with the state judicial process. . . . [T]he state retains an inherent interest in not having its judicial process grind to a halt while the federal courts decide constitutional questions").

Colorado River deferral is directed at promoting judicial efficiency, not as in *Younger* at furthering federalism, and has tightly restricted range. "[T]he circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Colorado River*, 424 U.S. at 818. In contrast to the decisions below which predicate deferral simply on the ground that the Tribes' regulatory jurisdiction has been challenged, *Colorado River* requires the existence of "exceptional" circumstances (*id.*) before "the contemporaneous exercise of concurrent jurisdictions" (*id.*

at 817) will be deemed inimical to judicial administration interests. That such exceptional circumstances do not exist here, where federal law governs resolution of the Petitioners' claims, is underscored by the Court's analysis in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 25-26 (1983), in which *Colorado River* deferral was denied:

> [W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, . . . the presence of federal-law issues must always be a major consideration weighing against surrender . . . .

Even if *Iowa Mutual* set a lower threshold for deferral in determining the merits of a nonfederal law dispute where concurrent federal and tribal court proceedings exist, nothing in that opinion indicates deferral is required when only federal law issues are presented and concurrent proceedings do not exist. *See Iowa Mutual*, 480 U.S. at 21-22 (Stevens, J. concurring & dissenting). Indeed, the lack of concurrent proceedings vitiates the very rationale for *Colorado River* deferral: wise judicial administration.

The importance of clarifying the scope of the *National Farmers Union* exhaustion requirement is clear. The decisions below represent an abdication by the federal judiciary of its central role in deciding difficult questions of governmental authority on Indian reservations. The amici

States regularly are confronted with the task of reconciling competing jurisdictional claims on those reservations. This task not only is legally complex but also presents substantial social and political difficulties. Tribes and their members often assert that state forums are insensitive to their interests, and nontribal members voice comparable concerns about tribal forums. Federal courts accordingly remain in many instances the only forum with the perceived ability to resolve jurisdictional questions impartially. The decisions below additionally run counter to the obligation of federal courts to exercise their jurisdiction when properly called upon by litigants to do so. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989); *see also McCarthy v. Madigan*, 112 S. Ct. 1081, 1087 (1992); *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). The sensitive nature of the federal issues involved here and the unprecedented disregard of the Petitioners' appropriate invocation of § 1331 jurisdiction warrant review.

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CONCLUSION

The amici States respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROSS MIDDLEMIST, *et al.*,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR LAKE COUNTY, MONTANA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR LAKE COUNTY, MONTANA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae Lake County, through its respective law officer, respectfully submits this brief pursuant to S. Ct. R. 37.5 in support of the petition for writ of certiorari.

INTEREST OF *AMICUS CURIAE*

The concern that prompts the filing of this *amicus curiae* brief can be simply stated. Much of the land today within Lake County, Montana, was at one time within the original Flathead Reservation. By Act of April 23, 1904, 33 Stat. 302 (Am. App. 1a-7a), some lands of the Reservation were allotted to individual Indians, and the unallotted lands opened to public settlement and entry.

(Approximately one million acres were opened in this manner on May 2, 1910, pursuant to the Presidential Proclamation of May 22, 1909, 36 Stat. 2494). As a result, only about half the original acreage of the Flathead Reservation is still held in trust for tribes or tribal members, and the remainder is held in fee, primarily by non-members (more than three-fourths of the population is non-members).

In short, the demographics of Lake County are not unlike those recently set forth in this Court in *Hagen v. Utah*, —— U.S. ——, 114 S. Ct. 958, 970 (1994). Because Lake County has already labored under the serious "burdens" noted in *Hagen* for over a decade, (*Hagen* at 970), the decision of the Court of Appeals promises to now almost effectively preclude the orderly administration of local government.

In this instance, the extent of the problem for any unit of local government is generally made clear in the tribal notice:

> Private individuals; Corporations, Local, County, State, Tribal and Federal Government Agencies who are going to be doing *any* type of construction work on or near *any* natural streams, rivers, lakes, or wetlands within the Flathead Reservation must submit an application and obtain an approved permit before any disturbance of the bed and banks of these waterways occurs.

Pet. App. A-47, *Middlemist v. Sec. of the U.S. Dept. of Interior*, 19 F.3d 1318 (9th Cir. 1994) *petition for cert. filed*, (U.S. July 5, 1994) (No. 94-42) (emphasis added).

Other ordinances, just as sweeping in scope, related and unrelated, are being passed and federally approved on a regular basis on this and other Indian reservations across the country—and nearly all are premised upon an assertion of substantial tribal jurisdiction over non-members and other non-tribal entities. As a result, routine activity

of all sorts that would have been undertaken and completed as a matter of course a year ago, has been deferred, placed on hold or, in many instances, simply cancelled (general development, roadwork, bridges, and so forth).

Threats of complex litigation are never enthusiastically received by the average citizen. The predictable response of doing nothing usually seems preferable. In most instances, it is at least the more affordable option. But for those who cannot wait and who still trust the federal courts "to secure the just, speedy, and inexpensive determination of every action" (Fed. R. Civ. P. 1), the choice here is misleading in the extreme. If everyone must now sue or be sued in a non-representative forum before federal claims for relief will be granted (or even entertained), when substantial rights or liberties are at stake in myriad fact situations, local government cannot even plan or promise to fulfill duties and obligations reasonably expected. In the absence of some specific Congressional directive, nothing in *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985) or *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) requires such an unworkable and unjust federal mandate.

SUMMARY OF ARGUMENT

The principles of comity and judicial economy animating *National Farmers Union* and *Iowa Mutual* have no application in the absence of litigation pending in tribal court. The text of both *National Farmers Union* and *Iowa Mutual* undermines any notion that pending litigation is not an absolute prerequisite to the application of the doctrine.

ARGUMENT

I. *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* HAVE NO APPLICATION IN THE ABSENCE OF LITIGATION PENDING IN TRIBAL COURT.

It is undisputed that *National Farmers Union* and *Iowa Mutual* are premised on the fact that litigation was pending in tribal court at the time that federal actions were commenced. Even the "questions presented" to this Court by the United States were structured in terms of a "claim pending" and a request to "enjoin" tribal proceedings. Brief for the United States as *Amicus Curiae* Supporting Respondents, *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) (No. 85-1589); Brief for the United States as *Amicus Curiae* Supporting Respondents, *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985) (No. 84-320). Nothing in the text of the opinions can fairly be cited to support or even indicate a more expansive reading was intended or permissible. Here, the district court simply thought general policy reasons and precedent in the circuit justified such a result. *Middlemist v. Secretary of the U.S. Dept. of Interior,* 824 F. Supp. 940, 944 (D. Mont. 1993). Evidently the Court of Appeals agreed and other circuits have also adopted this view without detailed analysis. *Duncan Energy Co. v. The Three Affiliated Tribes,* 27 F.3d 1294 (8th Cir. 1994) (Beam, J. at 1300 and Loken, J. concurring at 1303). Importantly, the text of both *National Farmers Union* and *Iowa Mutual* actually undermines any notion that pending litigation is not an absolute prerequisite to the application of the doctrine.

First, *National Farmers Union* cites *Juidice v. Vail,* 430 U.S. 327 (1977), in setting forth the delimiting principles of the abstention doctrine established in *Younger v. Harris,* 401 U.S. 38 (1971). *National Farmers Union,* 471 U.S. at 856 n.21. This narrowly tailored doctrine makes no sense in the absence of other pending litigation. Indeed, even the suggestion has been rejected for decades:

> [I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a state court *could* entertain it.

Alabama Pub. Serv. Comm'n v. Southern R.R. Co., 341 U.S. 341, 361 (1951) (emphasis added).

Secondly, the concurring and dissenting Opinion in *Iowa Mutual* (by the author of the opinion in *National Farmers Union*), defines this understanding *exclusively* in terms of pending litigation. *Iowa Mutual*, 480 U.S. at 20 (Stevens, J. concurring and dissenting). (Of course, we recognize that the absence of pending litigation was not actually an issue in *Iowa Mutual*—almost by definition).

Thirdly, Justice Marshall in *Iowa Mutual* referenced the initial issue in the context of pending litigation when he explicitly stated:

> [T]he rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

Id. at 16 n.8. *See also, Brief* for the United States, *Iowa Mutual* at 1-2, 21-22, (citing *Colorado River*).

There is absolutely no question that *Colorado River* abstention is expressly premised on pending litigation. Nor is there any doubt that such a principle can be simply ignored for other perceived public policy purposes. In fact, it is generally recognized that the opposite is the case:

> The Supreme Court, however, in two major decisions—*Colorado River Water Conservation District v. United States* and *Moses H. Cone Memorial Hospital v. Mercury Construction Co.* declared that such abstention is appropriate *only in very limited, exceptional circumstances.*

ERWIN CHEMERINSKY, FEDERAL JURISDICTION 663 (1989) (emphasis added).

Moreover, other circuits at least recognize the importance of this aspect of the exhaustion issue ("most serious") and indeed, even cite *Colorado River* generally. *Duncan Energy Co.*, (Loken, J. concurring at 1303). And finally, other recent cases recognize the importance of the doctrine generally and have decided to proceed more cautiously on a case by case determination. *See generally, Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812-815, (7th Cir. 1993), and *Texaco Inc. v. Zah*, 5 F.3d 1374, 1376-1378 (10th Cir. 1993):

> [W]e must depend upon the district courts to examine assiduously the *National Farmers* factors in determining whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814-15 (7th Cir. 1993) (noting that the propriety of tribal exhaustion depends upon a case by case examination of the comity factors).

Id. at 1378.

Nevertheless, the fact remains that in most circuits the pending litigation issue was almost summarily dismissed early on without reference to these principles. As a result, the prospect of correcting this misconstruction, already precedent in several circuits, is not likely. In the absence of some authoritative interpretation of this Court's opinions by this Court, even if a conflict among the circuits should later arise, it is not likely to shed further light on what this Court intended in *National Farmers Union* and *Iowa Mutual*. For this reason, at this point in time only this Court can authoritatively resolve the issue and the petition for certiorari should be granted now to avoid further unnecessary delay and uncertainty.[1]

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[1] Other reasons are set forth in the Brief of *Amici Curiae* States, submitted in support of the petition.

Although *amicus* does not doubt that the views of the United States (not yet submitted to this Court) could lend substantial credence and support to the petition at least in this important respect, such a submission is most unlikely. Almost certainly, the United States, at best, will alternatively conclude, for some reason, that there will be time enough another day for this Court to act. In this instance, the views of the United States are an important part of the problem, as the following argument attests.

II. THE VIEWS OF THE UNITED STATES SHOULD BE ASSESSED IN THE LIGHT OF THEIR PREVIOUS ARGUMENTS.

A. The United States told the Court of Appeals in no uncertain terms "Nothing in the language of the leading Supreme Court cases requires an ongoing tribal proceeding." Brief for Federal Appellees at 10, *Middlemist v. Secretary of the U.S. Dept. of Interior*, 19 F.3d 1318 (9th Cir. 1994) (No. 93-35315). Importantly, the United States neglected to point out that in those same cases, the United States told this Court a somewhat different story. Brief for the United States, *National Farmers Union*, Brief for the United States, *Iowa Mutual*. In fact, as noted above, in both instances the United States even structured the "questions presented" in terms of a "claim pending" and a request to "enjoin" tribal proceedings. Brief for the United States, *Iowa Mutual*; Brief for the United States, *National Farmers Union*. And, after *National Farmers Union* had been decided, the United States in *Iowa Mutual* stressed that the *Iowa Mutual* dispute was also "already the subject of a *suit pending* in tribal court" Brief for the United States at 2-3 (emphasis added), and emphasized that the federal suit:

> [C]oncerns precisely the same events and raises precisely the same issues as the *case pending* in the Blackfeet tribal court . . .

Id. at 7 (emphasis added).

Nevertheless, according to the United States, for some unstated reason, "nothing in the language" of the cases reflects this position.

The United States did not offer the Court of Appeals any explanation for this rather anomalous argument: namely, that both opinions generally adopt the position of the United States, but on this substantial point there was no reliance on the questions presented or the arguments submitted in support thereof.

Secondly, the United States also neglected to point out that a fair reading of *National Farmers Union* and *Iowa Mutual* could actually support the opposite conclusion. At least that should be the inference from the argument the United States submitted in *U.S. v. Plainbull*, 957 F.2d 724 (9th Cir. 1992). According to that Court:

> The *Government* also suggests that the district court abused its discretion by abstaining from the merits of this case because there was *no concurrent action pending* in the tribal courts.

Id. at 728. (emphasis added).

If "nothing in the language of the leading Supreme Court cases requires an ongoing tribal proceeding," the United States should explain their argument to the contrary. At the very least, if this argument is no longer persuasive, some decision of this Court should be cited in support of that proposition.

Of course, this is not to say that the United States (or any advocate) is not free to change its position or legal argument. However, the reasons that prompt the change are important. Here the point is especially telling and it has nothing to do with the principles of a subsequent decision of this Court.

The short of the matter is that in recent years, the United States has routinely and zealously supported tribal

territorial sovereignty over non-Indians in almost every instance imaginable. Since 1978, for example, see, Memorandum for the United States, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729), (arguing in support of tribal hunting and fishing jurisdiction over non-Indians); Brief for the United States, *Montana v. United States*, 450 U.S. 544 (1981) (No. 79-1128), (arguing in support of tribal hunting and fishing jurisdiction over non-Indians on fee lands); Brief for the United States, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546), (arguing in support of tribal criminal jurisdiction over non-member Indians); Brief for the United States, *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993) (No. 91-2051), (arguing in support of tribal hunting and fishing jurisdiction over non-Indians on fee lands owned by the United States).

Moreover, in almost every instance the arguments of the United States have been rejected by this Court and correctly so. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Duro v. Reina*, 495 U.S. 676 (1990); *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993). Undeterred, the United States then reads the rejection as narrowly as possible and simply marches on in support of tribal territorial sovereignty over non-members in renewed litigation as if the issue had not been authoritatively resolved. As a result, whatever deference might ordinarily be accorded the views of the United States in other federal litigation, is simply lacking here because of this strained though consistent "litigating position" in support of Indian Tribes. *South Dakota v. Bourland* at 2321.

As a practical matter, another factor compounds the problem presented by this type of seemingly relentless advocacy. At the same time, the United States, through its constituent agencies (presumably pursuant to Department of Justice advice), continues to approve tribal ordi-

nances claiming sweeping jurisdiction over non-Indians, in spite of the decisions of this Court. No doubt, the United States believes that this double barreled approach somehow advances a worthy cause. But the fact remains that these are now issues only Congress should decide. *Montana, Brendale, Duro* and *Bourland* reflect the controlling doctrine of this Court.

Nothing in *National Farmers Union and Iowa Mutual* requires the unworkable and unjust federal mandate in this case. It is too late in the day for the United States to really expect any other argument to be credible.

B. Part of the confusion on this issue stems from a related argument that does come directly from *Iowa Mutual*: the extent to which some courts have been unduly influenced in ordering exhaustion by the *Iowa Mutual dicta* once indicating tribal governments presumptively possess civil jurisdiction over non-Indians on fee land. (Not coincidently, the source of this argument can also be found in the submission of the United States. Brief for the United States, *Iowa Mutual*). At the time, this "presumption" conflicted squarely with the rationale and holding of *Montana v. United States, supra.* Since, it has been squarely rejected as "misplaced" in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 427 n.10 (1989) and refuted by the holding there, as well as the holding in *Bourland* ("*Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others." "[T]he reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' 450 U.S., at 564, 101 S.Ct., at 1258, and is therefore *not* inherent." *Bourland* at 2316, 2320 n.15 (emphasis as in original). *See also* the "very narrow powers" men-

tioned in *County of Yakima, et al. v. Confederated Tribes and Bands of the Yakima Indian Nation*, —— U.S. ——, 112 S.Ct. 683, 692 (1992) and the "[A]ll the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system" conclusion in *Duro* at 694.[2]

Nevertheless, the thought continues to find its way into many exhaustion opinions. In fact, the district court in the instant case placed specific reliance on this very sentence. *Middlemist v. Sec. of the U.S. Dept. of Interior*, 824 F. Supp. 940, 946 (D. Mont. 1993). And, as recently as this summer, the Court of Appeals for the Eighth Circuit cited the same presumption. *Duncan Energy* at 1299.

National Farmers Union and *Iowa Mutual* certainly should not be viewed in this light and if clarification is needed to finally put this issue to rest, this case could be the means by which that point is made. If one assumes that a citation to the presumption with approval evidences some indication of misplaced reliance, the extent of the problem is readily referenced. *See, e.g., Blaze Construc-*

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[2] The United States evidently still disagrees. The same presumption in support of a related argument was called to the attention of the Court of Appeals:

> See *Iowa Mutual*, 480 U.S. at 18 (civil jurisdiction over activities of non-Indians implicating the rights of Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

Brief for Federal Appellees, *Middlemist* at 15.

Moreover, according to the United States "*Brendale* itself illustrates the deep fissures within the Court concerning the nature and scope of tribal government power" and *Bourland* simply "turned on a detailed statutory analysis." Brief for Federal Appellees, *Middlemist* at 17, 18. (The "very narrow powers" mentioned in *Yakima* at 692 and *Duro's* "all the more reason to reject" conclusion were not addressed.)

tion Inc. v. U.S., 27 Fed. Cl. 646, 654 (1993); *Brown v. Washoe Housing Authority*, 835 F.2d 1327, 1329 (10th Cir. 1988); *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991); *Sanders v. Robinson*, 864 F.2d 630, 632-33 (9th Cir. 1988); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991); *Snowbird Construction Co., Inc. v. U.S.*, 666 F. Supp. 1437, 1443 (D. Idaho 1987); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989); *Stock West Corp. v. Taylor*, 737 F. Supp. 601, 603-04 (D. Or. 1990); *Stock West Corp. v. Taylor*, 964 F.2d 912, 922 (9th Cir. 1992); *Tom's Amusement Co., Inc. v. Cuthbertson*, 816 F. Supp. 403, 406 (W.D.N.C. 1993); *Twin City Construction Co. of Fargo v. Turtle Mountain Band of Chippewas*, 866 F.2d 971, 972 (8th Cir. 1989); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 578 (9th Cir. 1987).[3]

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[3] One final point should be mentioned. In 1982, the Court of Appeals addressed the status of this general area and several issues in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982). A concise summary of the case is presented in the dissenting views on denial of certiorari. *Id.* at 977-981. (Rehnquist, J., with whom White, J. joined, dissenting).

With respect to the disestablishment issue, at the time the dissent noted that *Namen* appeared to be based on principles derived from cases from this Court. As a result, that question did not then warrant review. *Id.* *Namen* was subsequently cited as persuasive authority throughout the circuits on this issue. For example, it was repeatedly relied on by the parties, the United States, and the opinions in support of continued reservation status (incorrectly) in the *Ute Indian Tribe v. State of Utah* litigation. *Ute Indian Tribe v. State of Utah*, 716 F.2d 1298 (10th Cir. 1983), 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), *rev'd in part, sub nom. Hagen v. Utah*, —— U.S. ——, 114 S.Ct. 958 (1994). (The contrast between *Namen* and *Hagen* in other respects is significant, but beyond the scope of this note).

The issues directly addressed in the dissent ("ownership" and "regulatory") have since been generally revisited in other cases. These cases support the views expressed in the dissent. *Utah*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 7, 1994

Div. of State Lands v. United States, 482 U.S. 193, 198 (1987), *United States v. Cherokee Nation*, 480 U.S. 700, 706 (1987); *Brendale, Bourland.*

APPENDIX

BEST AVAILABLE COPY

APPENDIX

Act of April 23, 1904 (33 stat. 302)

CHAP. 1495.—An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and headmen, and delegates of the confederated tribes of the superintendent of Indian affairs for the Territory of Washington, on the part of the ~~Un~~ited States, and the chiefs, Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to

inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars

per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person

shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.[1]

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[1] 41 L.D., 521.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

SEC. 12.[2] That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other

[2] A substitute for sec. 12 was enacted in sec. 9 of the act of 1905, ch. 1479, 33 Stat., 1080, post, p. 157.

missionary or religious societies that may make application therefor within one year after the passage of this act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisible for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reser-

vation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated out of the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this act.

SEC. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904.

No. 94-12

Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, STANLEY M. SPEAKS; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, ERNEST MORAN, IN THEIR OFFICIAL CAPACITIES; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, MICHAEL PABLO, SONNY MORIGEAU, LOUIS ADAMS, HANK BAYLOR, FRED MATT, TONY INCASHOLA, JOHN LOZEAU, LLOYD IRVINE, PATRICK LEFTHAND, LAURENCE KENMILLE; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, RHONDA R. SWANEY; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. LLOYD JACKSON; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, JOSEPH SCHNEIDER, GEM MERCER, AL HEWANKORN, DONALD LUCAS, THURMAN TROSPER, HENRY NORMANDEAU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-42

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, STANLEY M. SPEAKS; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, ERNEST MORAN, IN THEIR OFFICIAL CAPACITIES; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, MICHAEL PABLO, SONNY MORIGEAU, LOUIS ADAMS, HANK BAYLOR, FRED MATT, TONY INCASHOLA, JOHN LOZEAU, LLOYD IRVINE, PATRICK LEFTHAND, LAURENCE KENMILLE; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, RHONDA R. SWANEY; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. LLOYD JACKSON; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, JOSEPH SCHNEIDER, GEM MERCER, AL HEWANKORN, DONALD LUCAS, THURMAN TROSPER, HENRY NORMANDEAU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

I. THE ARGUMENTS OF PETITIONERS AND THE RESPONDENTS DEMONSTRATE THIS CASE PRESENTS IMPORTANT ISSUES WHICH SHOULD BE REVIEWED BY THE COURT.

Concluding a summary of their argument that in the absence of ongoing tribal proceedings the Court's decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), neither require nor allow deferral, eleven states supporting the issuance of a writ of certiorari to the Ninth Circuit Court of Appeals in this case correctly stated: "The Petition thus presents an important question over the scope of the *National Farmers* exhaustion doctrine—a question which should be decided now." Amici Brf. at 4. (*See also* the vacillating arguments of the government illustrating the need for review here. *Infra* at 8-10.) Neither the Tribal nor the Federal Respondents dispute the importance of the issues raised here. Nor could they.[1] The interests involved range from state sovereign interests in preserving basic principles of federalism to the individual Petitioners' interest in seeing their federal questions decided by a federal court. This range of interests includes the interests of counties in preserving their ability to make plans and budgets to fulfill their duties, and the interests of local governments such as the Flathead Joint Board of Control in preserving their ability to execute their duties and provide services to constituents.

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[1] In a case raising almost identical legal issues, plaintiffs challenging the assertion of tribal civil regulatory authority over their operations on nonmember-owned fee land in an "open" area, owned predominantly by nonmembers, of the Fort Berthold Reservation in North Dakota filed a Petition for Writ of Certiorari to' the Eighth Circuit Court of Appeals on October 17, 1994. *Duncan Energy, et al. v. Three Affiliated Tribes, et al.*, No. 94-689, seeking review of *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994), *rev'g Duncan Energy v. Three Affiliated Tribes*, 812 F.Supp. 1008 (D.C.N.D.).

[2] World Almanac & Book of Facts (1991) at 394.

Since there are 280 Indian reservations within the territorial confines of the United States,[2] and each tribe claims separate, pre-constitutional sovereignty, and since more than 700,000 nonmembers live within the boundaries of those reservations,[3] the issue is not only important in terms of the constitutional implications [4] and the power of Congress over Indian affairs, but also in terms of the number of people affected, the security of their persons and investment in their property, and the proper functioning of the federal judiciary in deciding federal questions affecting the relationship between tribes and nonmembers.

Respondents sensibly do not deny the doctrine fashioned by the Ninth Circuit concerning "reservation affairs," which even in the absence of ongoing proceedings requires a federal district court to abjure its "virtually unflagging duty" to adjudicate federal questions, raises important and troubling issues, since this broad exception would engulf the rule. Thus, whether the Ninth Circuit's decision and rationale (which the Tribal Respondents reiterate), the Federal Respondents' proffered justification, or Petitioners' position is correct, this Court should decide the matter directly.

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[3] U.S. Department of Commerce, Bureau of the Census, News Release July 11, 1991, Table 1.

[4] Respondents maintain the Tribes are unconstrained by constitutional niceties in dealing with nonmembers and seem to delight in asserting this as a defense to Petitioners' claims. Thus, the Tribes have argued here Petitioners constitutional claims are "frivolous" (Brief in Support of Motion to Dismiss at 16) and that they should "accept the fact of life" that they do not enjoy the protections of the Bill of Rights when regulated by tribal government. For that very reason, Petitioners argue, Congress would not have intended tribal governments to exercise authority over nonmember activity on fee land in this instance.

II. THE FEDERAL RESPONDENTS CONCEDE THE COURT HAS NOT ADDRESSED THE CENTRAL FACTOR IN PETITIONERS' AND AMICI'S ARGUMENT—THAT ABSENT ONGOING TRIBAL PROCEEDINGS *NATIONAL FARMERS* NEITHER REQUIRES NOR ALLOWS A COURT TO AVOID DECIDING A FEDERAL QUESTION PROPERLY BEFORE IT.

The Federal Respondents concede the Court has not "directly address[ed]" whether a federal court can abstain from deciding a federal question and require exhaustion of tribal remedies in the absence of ongoing tribal proceedings. U.S. Opp. at 8. While Petitioners believe otherwise, since it appears the Court did address the matter (as evidenced by the facts, language, analysis, and citations in *National Farmers* and *Iowa Mutual*), in essence the parties agree additional guidance from the Court is needed concerning the place of ongoing proceedings in a federal court's exercise of its discretion to decide whether to abstain and require exhaustion of tribal remedies. Petitioners argue these decisions plainly rested on the fact of ongoing proceedings in tribal forums. The Tribal Respondents, at least implicitly, argue the Court decided the issue and held the presence or absence of ongoing proceedings irrelevant. The Federal Respondents deny the Court decided this issue, and now offer a rationale lacking any basis in the Court's decisions that ongoing proceedings should not be required. (But see *infra* at 8-10.) In any event, it is evident review by the Court and a direct decision on this issue is needed.

III. RESPONDENTS ALSO ESSENTIALLY AGREE THE ISSUE HERE IS PURELY A FEDERAL QUESTION, AND IF THE TRIBES HAVE THE AUTHORITY THEY ASSERT IT MUST REST ON THE SECOND *MONTANA* EXCEPTION.

Similarly, Respondents do not dispute that, in the ordinance at issue, the tribes claim to possess pre-constitutional, inherent sovereign authority to regulate any non-

member farming and ranching activities which occur on aguatic lands (Thus, the Tribes claim authority to regulate the 86% nonmember population on the reservation which owns roughly 50% of the land overall; 90% of the land in the Irrigation District.). It follows, then, that the issue is solely the federal question of the limits of their authority. There is no issue of tribal law here.[5] Given this, they must concede the sole possible basis for this exception authority is the so-called *Montana* exception. *Montana v. United States*, 450 U.S. 544, 566 (1981). As to this, Respondents assert they should be given the opportunity to show facts indicating the Tribes do have inherent sovereign powers under this exception.[6]

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[5] Neither the Tribes nor the Federal Defendants ever argued in this litigation that as a matter of tribal law the Tribes have not asserted the challenged authority or that they do not possess that authority. (Federal Respondents are simply wrong when they imply a question of tribal law could be at issue. U.S. Opp. at 8.) Thus, the issue is purely one of federal law, vitiating both the need and the justification for deferring to a (nonexistent) tribal adjudication. In this light, the principles underlying the *National Farmers* doctrine should not carry much weight, just as the principles of comity have little force when a federal court is asked to abstain in favor of state remedies which are not ongoing. *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974). The fact is, while Congress' policies of tribal self-determination and self-government remain, so does the overriding imperative of "Our Federalism." Yet this does not suffice, in the absence of ongoing proceedings, to allow abstention. Moreover, the other *National Farmers* principles—gaining the benefit of tribal court expertise and development of a full record—are irrelevant in this context. Tribal courts have no more expertise in federal law than federal courts, and federal courts are equally adept at allowing litigants to develop full records on federal issues.

[6] Tribal Respondents argued this matter is not ripe because there is "no federal judicial record" as "Petitioner's litigation strategy denied the Federal and Tribal forums of the opportunity to develop findings of facts and conclusions of law." Tr. Opp. at 5, 9-10. On the contrary, by filing a motion to dismiss, Respondents made the litigation choice to address legal issues based on the well-pleaded facts construed in favor of Petitioners. *Conley v. Gibson*, 355 U.S. 41 (1957). Thus, they cannot seriously dispute

They do not, however, offer any explanation of how farming and ranching activities could possibly, as a matter of law, provide an exception to Congress' intent to abrogate tribal government authority over nonmember activity in acts specifically designed to bring nonmember farmers and ranchers onto the reservation. What is more, they fail to explain why the Court should not reach this legal issue now when they chose to focus this litigation on the legal issues raised in the complaint.

IV. THE CONFLICT BETWEEN THE COURT'S DECISIONS IN *NATIONAL FARMERS* AND *IOWA MUTUAL* AND THE DOCTRINE AS AMPLIFIED BY THE NINTH CIRCUIT AND AS APPLIED IN THIS CASE CANNOT BE RESOLVED EXCEPT THROUGH REVIEW BY THIS COURT.

Petitioners and amici argue ongoing proceedings are required before applying the *National Farmers* doctrine because it rests on "comity," and the Court has forcefully stated that, in the absence of ongoing proceedings, the principles of "equity, comity, and federalism have little force." *Steffel v. Thompson,* 415 U.S. 452, 462-463 (1974). Thus, they argue the principles on which the *National Farmers* doctrine rests—comity, congressional policies favoring tribal self-government, and judicial efficiency (which roughly parallel the principles of *Younger v. Harris,* 401 U.S. 37 (1971))—also lack force in the absence of ongoing proceedings. In any event, if, as the Federal Respondents claim without explanation, they do carry sufficient force to relieve a federal court of its virtually unflagging duty to decide federal questions, the rationale for this extraordinary doctrine[7] and the cir-

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that the issues of whether the court was correct in refraining from exercising its jurisdiction and whether on this record, as a matter of federal law, the Tribes lack the authority they assert are fully joined here.

[7] See concurrence of Loken, J., in *Duncan Energy,* 27 F.3d at 1302-03. Deferral in absence of ongoing proceedings "looks like a subversion of the 'virtually unflagging obligation of the federal

cumstances under which it will and will not operate should be explained by this Court.

The Federal Respondents' argument that the *National Farmers* doctrine is akin to the doctrine requiring exhaustion of federal administrative remedies appears singularly inapt, having no textual basis in the pertinent decisions. To be sure, the Court employed the terms "exhaustion" and "deferral" in these cases. But substance should always prevail over form,[8] and Petitioners do not argue the doctrine is *identical* to *Younger* abstention. In addition, the decisions which the Federal Respondents cite in favor of their analysis help prove Petitioners' point. U.S. Opp. at 9, n.2. In each case, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *Ticor Title Insurance Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987), the federal court plaintiff was already involved in ongoing federal administrative proceedings. The Federal Respondents' suggestion is also inapt because, contrary to their assertion, it would be anomalous to apply *National Farmers* in the absence of ongoing proceedings when such deferrence is neither given nor allowed in federal challenges to state laws in the absence of ongoing state proceedings. But whether the doctrine is one of abstention, deferral, or exhaustion, the divergent analyses proposed by the parties demonstrate this important issue is worthy and in need of review and resolution by this Court.

The implication (U.S. Opp. at 9) that this Court has limited *Younger* abstention to cases involving pending state proceedings so that a plaintiff could more

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courts to exercise the jurisdiction given them.'" (citation omitted.) *Id.*

[8] The "form" employed by the Court in terms of the cases and other authorities cited also points to *Younger* as the model. In fact, the exceptions to the doctrine, *National Farmers*, 471 U.S. at 856, n.21, *Iowa Mutual*, 40 U.S. at 19, n.12, are taken *in toto* from the *Younger* doctrine. It seems improbable that the Court would graft such exceptions onto a doctrine not closely allied in its important features to the doctrine from which they derive.

easily vindicate federal rights under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) in federal court is misleading. First, in light of federal courts' solemn obligation to exercise the jurisdiction given them, the burden is to justify *abstention*, not the need to go forward. Moreover, *Younger* appropriately looks not to the type of federal right asserted but the factors of equity, comity, and federalism. A doctrine of sound judicial administration in light of "Our Federalism," it was not fashioned to provide more solicitous federal court concern for some federal causes of action than for others. The fact is many federal claims not arising from 42 U.S.C. § 1983 are heard in federal courts and exempted from *Younger* abstention simply because there are no ongoing proceedings.

The simplest explanation, however, may be the best retort to this suggestion. If, in fact, the Court has not required abstention for cases based on § 1983, then one would assume the Court would have said this. It has not. In fact, it has explicitly said that even § 1983 actions are subject to abstention if there are ongoing state proceedings.[9]

Not surprisingly, the Federal and Tribal amici and the Tribal Respondents in *National Farmers* made arguments

[9] The central reason discussed in *Steffel*, of course, for not requiring abstention was the lack of ongoing proceedings, not the importance of the rights at stake. Be that as it may, it is worth noting that contrary to the *Younger* context, where the price of abstention is sometimes justified because the states are obligated to protect federal rights and there is a statutory procedure for reviewing state decisions, tribal governments are not required to respect federal constitutional rights, tribal courts are not required to protect such rights, and there is no statutory avenue for review of their decisions affecting such rights. A writ of habeas corpus represents the only statutory avenue of review of a tribal government's actions. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). But this remedy rests on the assumption the tribal government acted within its sovereign authority, which is the central issue here. The remedy for an *ultra vires* acts of tribal government has neither been restricted nor provided by statute.

to the Court along the lines Petitioners advance here. The two principle arguments advanced by the Respondents and Amici were (a) that every court has jurisdiction to determine its jurisdiction, and (b) the *Younger* abstention doctrine provides the "most apt" analogy for fashioning a doctrine deferring to ongoing proceedings in tribal courts. Brief of Amici Curiae Assiniboine and Sioux Tribes, et al., at 21, citing Wright, Law of Federal Courts § 16 (1976) and analogizing to *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); see also Brief of Respondents Crow Tribes and Officials in Opposition to Petition for Writ of Certiorari, at 6-9; and Brief on the merits at 14-17.

It is surprising, then, to find the government here arguing against the Petition in light of its earlier arguments to this Court. Moreover, in the Ninth and Tenth Circuits, the government has since argued the inapplicability of the doctrine in the absence of ongoing proceedings. Thus, characterizing the issue as one of "abstention," in *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992), the Department of Justice argued to the Ninth Circuit in a petition for rehearing and rehearing en banc that "The Supreme Court in *National Farmers Union* and *Iowa Mutual* had no occasion to consider whether a district court must require exhaustion of tribal court remedies when a case presents issues of federal, not tribal law, and where there is no pending tribal court proceeding." (Brf. on Rehearing, at 12.) (Citations omitted.) In a footnote appended to this text, it argued, "the absence of any pending tribal court proceedings *is* relevant . . . See also *Colorado River, supra,* (presence of pending state proceeding deemed as critical factor in abstention analysis)." *Id.* (Emphasis in original.) That the government advanced such arguments in a request for rehearing en banc indicates they have some validity, contrary to the dismissive approach Respondents take in regard to them here.

Attorneys for the Department of Justice have also advanced similar arguments recently in the Tenth Circuit. In *Pittsburg & Midway Coal Mining Co. v. Derrick Watchman*, No. 94-2060, Tenth Circuit Court of Appeals, the United States argued in an amicus brief that in assessing the factors of comity under *National Farmers*, "it is our view that courts should be guided by a governing set of standards for *abstention* which parallel those principles applicable to questions of whether federal courts should interfere with state judicial and administrative proceedings." (U.S. Amicus Brf. at 7) (Emphasis supplied.) Moreover, the government framed the issue as concerning the pertinent factors for deciding "whether a federal court should interefere with an (sic) ongoing tribal administrative or judicial proceedings." *Id.* at 14. Thus, in this brief, submitted by the Acting Assistant Attorney General, Lois J. Schiffer, who appears in this case, the Government contradicted its position here.

More important than the shifting labels the Government has used to characterize this doctrine, however, is the fact that it has argued, as Petitioners do here, that ongoing tribal proceedings are an indispensable predicate to application of the *National Farmers* doctrine. It was correct then, as the Petitioners are now.

CONCLUSION

Therefore, Petitioners respectfully request that the Court issue a writ of certiorari to the Ninth Circuit Court of Appeals to review the decision in this matter.

Respectfully submitted,

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